82-479

FILED
SEP 17 1982
ALEXANDER L. STEVAS,

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. ORR,
AS GOVERNOR OF THE STATE
OF INDIANA, *et al.*
Petitioners,

v.

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Linley E. Pearson
Attorney General of Indiana
David Michael Wallman
Deputy Attorney General
Donald P. Bogard
Special Counsel
Attorneys for Petitioners

219 State House
Indianapolis, Indiana 46204
(317) 232-6210

Central Publishing Company, Inc., Indianapolis, IN 46206

QUESTIONS PRESENTED FOR REVIEW

1. Whether a duly enacted nondiscriminatory 1974 statute providing a mechanism of cost allocation among the parties to a desegregation remedy, may be ignored by a District Court in 1980 in the absence of any challenge or holding by any court of a constitutional defect in that statute, and the entire cost of metropolitan desegregation placed upon the State of Indiana with specific direction as to how and where to obtain the funds.

2. Whether the decision which is the subject of this Petition was a proper exercise of equitable jurisdiction when the effect of that decision, combined with the earlier substantive decision ordering one way transfer of black students to suburban schools, financially insulates all school corporations and offers no incentive to provide black parents the right to vote in school board elections, to be candidates in school board elections, or to share in the governance of the school system, all basic rights available to resident white parents and all other citizens pursuant to state law.

LIST OF PARTIES

Petitioners for this Writ are Robert D. Orr, as Governor of the State of Indiana; Linley E. Pearson, as Attorney General of the State of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; the Indiana State Board of Education, a public corporate body; and all additional state officials who had been duly served and joined as party-defendants below. Respondents to this Petition who briefed the issues before the Seventh Circuit are the Metropolitan School Districts of Lawrence, Wayne, Warren and Decatur Townships of Marion County, Indiana; the Board of School Commissioners of the City of Indianapolis, Marion County, Indiana; the United States of America; the Indiana State Teachers Association; and Donny Brurell Buckley and

Alycia Marquese Buckley for themselves and a class of black Indianapolis school children.[1]

---

[1] The Metropolitan School Districts of Perry Township and Franklin Township, Marion County, Indiana, did not file a brief in the Seventh Circuit but were parties below and are recipients of funds paid pursuant to the order which is the subject of this Petition.

TABLE OF CONTENTS

	Page:
Questions Presented for Review	i
List of Parties	i
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions	1
Statement of the Case	2
Facts Material to the Consideration of the Questions Presented	3
Reasons for Allowance of the Writ	4
I. A Valid Statute of the State of Indiana Should be Given Deferrence by the District Court	4
II. The Order Perpetuates a Patently Illegal Situation and Rewards Parties Who Directly Participated in the Original Violation	10
Conclusion	13

TABLE OF AUTHORITIES

Cases	Page:
Association of Data Processing Service Organization, Inc. v. Camp (8th Cir., 1969) 406 F.2d. 837	10
City of New Orleans v. New Orleans Water-Works Co. 142 U.S. 79, (1891)	10
Evans v. Buchanan (3d Cir., 1978) 582 F.2d 750	8
Kramer v. Union Free School Dist., 395 U.S. 621, 89 S.Ct. 1886 (1969)	11
Milliken v. Bradley 433 U.S. 267, 291 (1977)	9
Pawhuska v. Pawhuska Oil and Gas Co. 250 U.S. 394, 398, (1919)	10
Reeves v. International Telephone and Telegraph Corp. (5th Cir., 1980) 616 F.2d. 1342	10
Reynolds v. Sims 377 U.S. 533 (1968)	11
San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973)	7
Thompson v. Union Pacific R. R. 76 U.S. (9 Wall.) 579 (1980)	7
U.S.A. v. Board of School Comm. (S.D. Ind. 1971) 332 F.Supp. 655	2,4,6
U.S.A. v. Board of School Comm. (S.D. Ind. 1973) 368 F.Supp. 1224	2,3,4
U.S.A. v. Board of School Comm. (S.D. Ind. 1975) 419 F.Supp. at 188	2,3,4,5
U.S.A. v. Board of School Comm. (S.D. Ind. 1978) 456 F.Supp. 182	2,3,4,6
U.S.A. v. Board of School Comm. (7th Cir. 1973) 474 F.2d 81, *cert. denied* 413 U.S. 920	2
U.S.A. v. Board of School Comm. (7th Cir. 1974) 503 F.2d 68	2,3,5

U.S.A. v. Board of School Comm. (7th Cir. 1980) 637 F.2d 1101, *cert. denied* 101 S.Ct. 114 2,3,5

U.S.A. v. Board of School Comm. (7th Cir. 1982) 677 F.2d 1185 1,6,8,12

Williams v. Mayor and City Council of Baltimore 289 U.S. 36, 40, (1933) 10

Constitutional and Statutory Provisions

Page:

Tenth Amendment, Constitution of the United States of America 1,7

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2101(c) 1

I.C. 20-8.1-6.5-1 *et seq.* (Transfer Statute)..... 2,3,4

I.C. 36-3-1-1 *et seq.* (Uni-Gov) 2,11

Other Authorities

Page:

Rule 17.1(a)(c) Rules of the Supreme Court..... 1

Rule 20.4 Rules of the Supreme Court 1

Rule 12(h)(3) Federal Rules of Civil Procedure 10

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit) issued on March 26, 1982, has been reported at 677 F.2d 1185 (7th Cir., 1982). A copy of that opinion has been appended hereto at page A-1. A Petition for Rehearing and Suggestion That It Be Heard En Banc was timely filed and was denied by the Seventh Circuit on June 22, 1982. A copy of the Order is attached hereto at page A-20.

The Seventh Circuit affirmed a judgment of the United States District Court for the Southern District of Indiana (hereafter District Court) issued on July 17, 1981. That decision has not been officially reported, but a copy is appended hereto at page A-21.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 17.1(a) and (c) of the Rules of this Court to review an opinion of the Seventh Circuit which has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, and which has decided an important, unsettled question of state law by approval of the District Court's opinion which, under the guise of continuing equity jurisdiction, ignored that valid state statute, perpetuating a situation directly in conflict with applicable decisions of this Court.

The denial of the Petition for Rehearing was entered on June 22, 1982. This Petition is timely in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101(c) and Rule 20.4 of the Rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Tenth Amendment to the Constitution of the United States provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

The Indiana Transfer Statute, I.C. 20-8.1-6.5-1 *et seq.*, is appended hereto at page A-65.

STATEMENT OF THE CASE

In May, 1968, the United States brought suit against the Board of School Commissioners of the Indianapolis Public Schools (hereafter I.P.S.), its members and its superintendent, charging that the Board was operating a segregated school system. Subsequently, the District Court found I.P.S. guilty of *de jure* segregation. 332 F. Supp. 655 (S.D. Ind., 1971), *aff'd.* 474 F.2d 81 (7th Cir., 1973), *cert. denied*, 413 U.S. 920 (1973).

Following the District Court's 1971 opinion, two black children intervened in the case and filed a class action complaint and an amended complaint which named the State and numerous school districts as added defendants. After various trials and appeals[2], the District Court found the added Defendants Housing Authority of the City of Indianapolis (hereafter HACI) and the State guilty of inhibiting the desegregation of I.P.S.; found the State prohibited the desegregation due to passage of limited consolidated city-county government, I.C. 36-3-1-1 *et seq.* (Uni-Gov); and ordered an interdistrict remedy. 456 F.Supp. 183 (S.D. Ind., 1978), *aff'd.*, 637 F.2d 1101 (7th Cir., 1980), *cert. denied*, 101 S.Ct. 114 (1980).

After that remedy was in place, three suburban schools which were receiving students from I.P.S., petitioned the

---

[2] Intervening decisions by the various courts in this case are as follows: 368 F.Supp. 1191 (S.D. Ind., 1973), *aff'd in part, reversed in part, and remanded*, 503 F.2d 68 (7th Cir., 1974), *cert. denied* 421 U.S. 929 (1975); 419 F.Supp. 183 (S.D. Ind., 1975), *aff'd.* 541 F.2d 1211 (7th Cir., 1976), *vacated and remanded*, 429 U.S. 1068 (1977), 573 F.2d 400 (7th Cir., 1978) [following remand by this Court].

District Court to assess all costs of the interdistrict remedy against the State. The District Court granted that Petition, and this review commenced.

Facts Material to the Consideration of the Questions Presented

In early 1974, at the behest of the District Court in its 1973 opinion, 368 F.Supp., at 1224-1227, the Indiana General Assembly enacted the Transfer Statute. That statute has never been challenged in court, but has on several occasions prior to the implementation of the remedy been found applicable to this case by both the District Court and the Seventh Circuit; see 419 F.Supp., at 183; 456 F.Supp., at 191; 503 F.2d, at 74; 637 F.2d, at 1112.

REASONS FOR ALLOWANCE OF THE WRIT

I.

A Valid Statute of the State of Indiana Should be Given Deferrence by the District Court

In 1973, the District Court reaffirmed its original findings against I.P.S. 332 F.Supp 655; found the State committed acts of *de jure* segregation by approving the site selection of three I.P.S. high schools and committed an "omission tending to inhibit desegregation" of I.P.S.; and ordered a one-way transfer of black students from I.P.S. to twenty-four surrounding school corporations. 368 F.Supp. 1191, 1203, 1209. In December of that year, the Court issued a supplementary opinion in which, *inter alia*, it challenged the Indiana General Assembly to provide a mechanism to remedy the segregation in I.P.S., 368 F.Supp., at 1224-1227. At its next regular session commencing in January, 1974, the General Assembly enacted the Transfer Statute which provides that if three (3) basic findings are made then payment provisions become applicable. I.C. 20-8.1-6.5-1 and I.C. 20-8.1-6.5-3, Appendix p. A-65, A-66.[3]

In 1975, the District Court specifically found the elements necessary for application of the Transfer Statute. 419 F.Supp., at 184. Those findings were reaffirmed on two subsequent occasions: an unpublished opinion dated June 2, 1978 A-54, and at 456 F. Supp., at 191. They were never challenged or vacated in any of the numerous appeals in this case.

---

[3] Stated briefly, if the above findings are made, the Transfer Statute provides that the State of Indiana will voluntarily pay half the cost of transportation necessitated by any remedy. The statute goes on to allocate other costs between and among the parties, assuring that the costs are met by providing advances from future state distributions if those are necessary, IC 20-8.1-6.5-4(2), or through loans or grants from state funds, IC 20-8.1-6.5-4(1) and (3). A-67.

In those previous opinions, the District Court was quite laudatory of the purpose of the Transfer Statute:

> Specifically, the statute provides a means and method whereby a transferor school corporation may pay a transferee school corporation for the cost of education of a pupil transferred from the one to the other in compliance with a court order issued under the following conditions... 419 F.Supp. 180, at 183 (1975).
>
> • • •
>
> In its Supplemental Memorandum of Decision dated December 6, 1978, 368 F.Supp. 1191 beginning at 1223, *this Court recognized both the right and the duty of the General Assembly of Indiana to legislate with a view toward assisting in the process of desegregation...* indeed, the General Assembly was encouraged to come up with a workable solution of its own.
>
> Shortly thereafter, during its 1974 session, *the General Assembly acted promptly upon this Court's suggestion,... and provided a workable method of reimbursement to the transferee corporations...*
>
> ...The statute represents purely and simply a State enacted remedial measure, *which the General Assembly had undoubted power to enact.* (unpublished opinion, June, 1978, emphasis supplied). A-52, A-53.

The Seventh Circuit has likewise discussed the purpose and relevance of the Transfer Statute. 503 F.2d, at 74 (7th Cir. 1974); 637 F.2d, at 1112 (7th Cir. 1980).

Nevertheless, after the liability and remedy portions of this case had been finally concluded, including denial of petitions for writs of certiorari, both the District Court and the Seventh Circuit denied the applicability of the Transfer Statute to pay for the costs of the desegregation of I.P.S., and prevented its implementation.

The situation arose in June, 1981, when three suburban school corporations[4] which were receiving black students from I.P.S. petitioned the District Court to have all costs of the interdistrict remedy imposed upon the State. Following a hearing, the District Court granted the petition, and stated that:

> ... To use this Indiana Transfer Act to assess the cost of desegregation would ignore the nature and cause of the constitutional violations found by the Court and would impose the burden of these costs on I.P.S. despite the Court's finding, affirmed by the Seventh Circuit, that the acts of segregation by I.P.S. did not cause interdistrict segregation. A-40.

In a divided opinion, the Seventh Circuit affirmed the District Court. 677 F.2d 1185. Speaking for the majority, Judge Swygert incorrectly stated that only the State has been found liable for interdistrict violations. 677 F.2d. at 1186 and 1187. That statement ignores the fact that the HACI was also found liable, 456 F.Supp. 188, plus the underlying fact that IPS was found guilty of *de jure* segregation against the black students now being transferred out of I.P.S. before the State was ever a party to this case. 332 F.Supp. 655.

The result of these holdings is that the State is to pay the entire cost of metropolitan desegregation[5].

---

[4] The Metropolitan School Districts of Lawrence, Warren, and Wayne Townships of Marion County, Indiana.

[5] These costs can be summarized as follows:

1. The full amount of the difference between the average cost of education of a student in I.P.S., and the cost of educating a child in the respective transferee school corporations for all students subject to the transfer order. A-30.

2. The full cost of transportation, both regular and extra-curricular, for all students transferred from I.P.S to the township schools. A-30.

Not only did the District Court order the State to pay the entire cost of the metropolitan remedy, but it also specifically directed the source of funds to be used for those costs. A-33. ¶6. The Order provides that the State must comply by using "unappropriated surplus", and if that is insufficient, the amount must come from a source other than the state education appropriation[4]. Since no unappropriated surplus exists, state officials must make payment from sums authorized by the General Assembly for mental health, corrections, welfare or other state services, a restriction on discretion not utilized against a common defendant.

Petitioners would submit that the State, pursuant to the Tenth Amendment to the Constitution of the United States of America and common principles of federalism, has the inherent authority to structure its own finances. *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1 (1973); *Thompson v. Union Pacific R. R. Co.* 76 U.S. (9 Wall.) 579, 591 (1870).

In this case, the General Assembly passed a statutory series in 1974 designed to facilitate any eventual remedy entered by any court. Indeed, seven (7) years before cross-district busing became a reality, the General Assembly had

---

3. The full cost of unspecified "other costs of desegregation." (Order, A-31.

4. The full cost of an artificially generated figure reputed to be the added overhead of I.P.S. due to the loss of approximately 5,500 pupils. (A-31).

Those costs were assessed even though the enrollment of I.P.S. decreased from 108,299 students in 1968 (the year in which the Justice Department filed suit against I.P.S.) to 62,894 students in 1981 (the year the remedy stage of this case was implemented). That decrease amounts to an average of over 3,243 fewer students per year in I.P.S. schools for thirteen straight years.

[4] This appropriation was $976,000,000 for fiscal 1981. A-41.

recognized the possibility of the eventual result and acted promptly, not to obstruct desegregation, but to provide a vehicle to ensure the orderly application of any judgment in a manner which provided payment of all necessary costs.

The authority of the State is present whether the Transfer Statute is viewed as an explicit taxing mechanism as in *Evans v. Buchanan*, (3d Cir., 1978) 582 F.2d 750, or as a less formal allocation of the financial burden. As long as the statutory series has been duly enacted by the Indiana General Assembly it is entitled to application absent some independent constitutional infirmity.

As Judge Posner noted in dissent in the Seventh Circuit:

> My contention that the financing issue ought to be left to the state to resolve derives from the nature of our federal system, which implies that interventions by federal courts into the processes of state government ought to be minimized, but more simply from traditional notions of equity jurisprudence. The end of an equity suit is an injunction, or if the injunction is not obeyed a contempt proceeding; it is not an inquiry into who will bear the costs of the injunction. Suppose a company was found to have violated Title VII of the Civil Rights Act of 1964 by paying its black workers less than its white workers, and an injunction forbidding the discrimination was entered. No one would ask where the company was going to get the money to pay higher wages to its black workers (presumably the market would not let it just lower the whites' wages to the blacks' level) — whether it was going to raise prices and reduce output, or use more labor-saving machinery and reduce its work force, or reduce dividends, or what have you. These are fascinating questions for economists, but too difficult and tangential to engage the attention of courts, as the Supreme Court has held in dealing with comparable

> issues of "incidence" in the antitrust field. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 732, 741-422, 97 S.Ct. 2061, 2067, 2072, 52 L.Ed.2d 707 (1977). Only if the company attempted to comply with the injunction by committing a fresh act of discrimination, as by firing its black workers, would the question of how the costs of the injunction were being defrayed come before the court that had issued the injunction. I do not see why the result should be different in this case. A defendant that happens to be a state of the United States is entitled to as much consideration as a private corporation.

677 F.2d at 1191-1192.

In *Milliken v. Bradley*, 433 U.S. 267, 291 (1977) this Court affirmed a decision which imposed half the cost of desegregation on the state and the other half on the offending school corporation, but rejected Michigan's Tenth Amendment arguments, stating:

> ...The District Court has neither attempted to restructure local governmental entities nor to mandate a particular method or structure of state or local financing. Cf. *San Antonio Independent School Dist. v. Rodriquez*, 411 U.S. 1, (1973). The District Court has, rather, properly enforced the guarantees of the Fourteenth Amendment... in a manner that does not jeopardize the integrity of the structure or functions of state... government.

Here, the District Court did precisely what this Court found lacking in *Milliken*. The crucial differences between *Milliken* and this case are that Michigan had no statute allocating desegregation costs[7], and the fact that the District Court specified the source of the funds. Thus, the

---

[7] Indeed, *no* reported desegregation/finance case considered the applicability of a state statute specifically designed to deal with desegregation expenses.

Tenth Amendment is clearly applicable.

The outcome in this case is also anomalous because the moving parties before the District Court were suburban school systems which are all subordinate public entities created by Indiana law. In addition to the impropriety of the result reached as discussed above, the federal judiciary has intruded upon a disagreement between a state and its political subdivisions. Petitioners would submit that political subdivisions do not have standing to mount a direct challenge to a state statute, *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40, (1933), *Pawhuska v. Pawhuska Oil and Gas Co.*, 250 U.S. 394, 398, (1919), *City of New Orleans v. New Orleans Water-Works Co.*, 142 U.S. 79, (1891)[8]

II.

The Order Perpetuates a Patently Illegal Situation and Rewards Parties Who Directly Participated in the Original Violation

The substantive desegregation decree for Marion County, Indiana after some fourteen (14) years of litigation consisted of the creation of geographical areas within Indianapolis from which black students are sent to selected suburban schools. In some cases, the black students are from contiguous areas while in other cases, they are transported from areas far across the city. No white students are transported.

The initial effect of the Order which gave rise to this Petition is that the District Court and the Seventh Circuit financially insulated all parties to this action from payment

---

[8] A lack of standing is a lack of subject matter jurisdiction, which, pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure, may be raised at any time. *Association of Data Processing Service Organization, Inc. v. Camp*, (8th Cir., 1969) 406 F.2d. 837; *Reeves v. International Telephone and Telegraph Corp.*, (5th Cir., 1980) 616 F.2d. 1342.

except for the State of Indiana. However, the final result of this judicially created financing mechanism is that there is no incentive for any of the parties to explore alternative desegregation plans or to modify what is a patently flawed final substantive decree. This means that black parents in the transferring areas will continue to pay property taxes to I.P.S., a school system their children do not and will never again attend; those parents will never be allowed to be candidates for school board membership in the suburban school systems now charged with educating their children; and they will not be able to vote for school board members in the suburban schools systems. This result is somewhat amazing given this Court's controlling precedents[9] and the fact that this litigation commenced in 1968 presumably to vindicate the rights of the black population of Indianapolis.

It should also be noted that both the District Court and the Seventh Circuit ignored not only the liability of HACI, but awarded, as proper equitable relief, state funds to the respondent suburban school districts which bore primary responsibility for the alleged "state violation" which necessitated the metropolitan remedy. In brief summary, state liability was based upon the passage in 1969 of a governmental reorganization series commonly known as Uni-Gov[10]. Uni-Gov provided for the consolidation of certain functions of Marion County government with a number of significant exceptions, fire protection, police, garbage collection, to name but a few. Education was one of the exceptions. None of the suburban school districts

---

[9] See the result reached by this Court in *Kramer v. Union Free School Dist.*, 395 U.S. 621, 89 S.Ct. 1886 (1969), and *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1968). No modern precedent from this Court countenances the denial of substantive rights to blacks by the federal judiciary under the guise of equitable jurisdiction.

[10] Uni-Gov was passed some nine (9) months after this case commenced and became effective one year and seven months from that date.

clamored to go out of business, and, as Judge Posner noted in dissent:

> ... Now no one, I take it, thinks that the reason why IPS's boundaries were not expanded to embrace the whole of Marion County was that the voters of South Bend or Fort Wayne or Evansville, who will share the cost of the busing decree under the order affirmed today, wanted the public schools of suburban Marion County to remain white. The schools exception to Uni-Gov was procured by the legislators elected by the people of suburban Marion County. This is not only obvious but was found as a fact by the district court in this litigation.
>
> The "Mayor [of Indianapolis], testifying as a witness, gave no educational or governmental reason for excluding the [suburban] schools from the reach of Uni-Gov. He simply (and no doubt accurately) stated that the Uni-Gov bill would not have passed had the schools been included. The inference is that the representatives elected by the vote of suburban residents—many of whom had recently moved to the suburbs from the central city to escape the threat of desegregation posed by the filing of this very suit in 1968—would have voted against Uni-Gov but for exclusion of the schools." *United States v. Board of School Comm'rs*, 456 F.Supp. 183, 187 (S.D. Ind. 1978).
>
> Thus, so far as segregation between school districts is concerned, which is all that is before us in this appeal, it is the residents of the white suburbs of Marion County who are the primary wrongdoers, as a matter of equity if not of law, for there would be no need for an interdistrict busing order without the schools exception in Uni-Gov and there would be no schools exception but for the actions of the white voters of suburban Marion County. As the district court stated in another of its opinions in this litigation, "the

> suburban Marion County units of government... have consistently resisted the movement of black citizens or black pupils into their territory. They have resisted school consolidation, they resisted civil annexation so long as civil annexation carried school annexation with it, they ceased resisting civil annexation only when the Uni-Gov Act made it clear that the schools would not be involved. Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both the officials and inhabitants of such areas has been to discourage blacks from seeking to purchase or rent homes therein...." *United States v. Board of School Comm'rs*, 419 F.Supp. 180, 182- 83 (S.D. Ind. 1975). 677 F. 2d at 1193

Petitioners would submit that it is not within the proper exercise of equity jurisdiction to award to a primary wrongdoer, upon that wrongdoer's own petition, state funds in a manner at distinct variance with both state statutory law and decisional law from this Court.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the decision of the Seventh Circuit.

Respectfully submitted,

Linley E. Pearson
Attorney General of Indiana
David Michael Wallman
Deputy Attorney General
Donald P. Bogard
Special Counsel
Attorneys for Petitioners

219 State House
Indianapolis, Indiana 46204
(317) 232-6210

Dated:
September 17, 1982

IN THE

United States Court of Appeals

For the Seventh Circuit

No. 81-2209

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

DONNIE BRURELL BUCKLEY and
ALYCIA MARQUESE BUCKLEY, etc.,

Intervening Plaintiffs-Appellees,

v.

THE BOARD OF SCHOOL COMMISSIONERS OF
THE CITY OF INDIANAPOLIS, *et al.*,

Defendants-Appellees,

ROBERT D. ORR, as Governor of the State of Indiana, *et al.*,

Added Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. IP 68-C-225—S. Hugh Dillin, *Judge.*

ARGUED JANUARY 21, 1982 — DECIDED MARCH 26, 1982

Before CUMMINGS, *Chief Judge*, SWYGERT, *Senior Circuit Judge*, and POSNER, *Circuit Judge*.

SWYGERT, *Senior Circuit Judge*. This court has previously addressed both liability and remedial issues in the Indianapolis school desegregation case. We shall not repeat the history of the litigation. See F.2d 1101 (7th Cir. 1980). The only issue here is who shall pay the cost of the desegregation plan ordered by the district court for interdistrict violations in Marion County, Indiana.

The following statements constitute the law of this case and underlie our decision.[1] Only the State of Indiana was found liable for the interdistrict violations. 456 F.Supp. 183, 188. The basis for its liability included the enactment of Uni-Gov legislation. *Ibid.* Neither the Board of School Commissioners of the City of Indianapolis, Indiana (hereinafter "IPS") nor the suburban school districts were found liable for the interdistrict violations. 506 F.Supp. 657, 666-68. The district court established a desegregation plan to remedy the interdistrict violations. It ordered black students from IPS to be transferred to designated suburban districts; it also ordered the state to design, implement, and pay the costs of in-service training and other ancillary relief. 506 F.Supp. at 761-74. We have affirmed these findings and orders. 637 F.2d 1101 (7th Cir. 1980). The Supreme Court has denied all petitions for certiorari. 449 U.S. 838 (1980).

On June 19, 1981 four suburban school districts filed with the district court a petition that sought a ruling on who was financially responsible for the cost of the desegregation plan. The school year was to begin soon, the Indiana General Assembly had met and adjourned without appropriating funds for the desegregation plan, and the

---

[1] The issue of who shall pay the cost of remedying intradistrict violations within IPS is not before this court. That issue, of course, would present a different posture.

petitioners were understandably concerned about where the funds for the plan would come from. Allocating the costs of a desegregation plan is, of course, part of the remedial power of the district court. *See Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977). The district court held that the State of Indiana should pay the entire cost of remedying the interdistrict violations because it alone had been found liable for them. Memorandum of Decision, July 17, 1981, at 3.

The district court also held that the State of Indiana must pay the receiving school corporation the transfer tuition for any IPS student sent to it. The state may then deduct the transfer tuition from state distributions otherwise payable to IPS. The state must pay all transportation costs, including the cost of transportation in extracurricular activities. The state must reimburse IPS for increased costs attributable to the loss of enrollment and reduction in staff resulting from the court's remedial orders. Finally, the state must initially make these payments from unappropriated funds, and state officials may not discriminatorily reduce state distributions to the school corporations affected by the court's order.

The state alleges various grounds for reversal. For the reasons stated below, we affirm the district court's order.

I

In 1974 the Indiana General Assembly enacted Indiana Code 20-8.1-6.5-1 *et seq.* (hereinafter the "Transfer Statute"). It provides that the State of Indiana will pay one-half of the cost of transportation ordered by a court (while the local school districts involved will bear the balance) if the following three conditions are met:

> A. A transferor corporation has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing *de jure* racial segregation of the students within its border,

B. A unitary school system within the meaning of such Amendment cannot be implemented within the boundaries of the corporation, and

C. The Fourteenth Amendment compels the Court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment.

Ind. Code § 20-8.1-6.5-1. The state contends that the district court erred in not following the terms of this statute. it argues that the transfer statute applies to this case, that the three conditions are met, and so the financial liability of the state should be limited to fifty percent of the costs.

A

The state asserts that the applicability of the transfer statute is the law of the case because the district court has held previously that the three conditions for the applicability of the statute have been satisfied. This contention is erroneous. In an earlier ruling the district court did interpret the transfer statute as a substantive basis for liability. We reversed, holding that the statute is procedural only. 637 F.2d at 1112. Neither court has previously decided whether the transfer statute has any applicability at the remedial stage.

B

We hold that the transfer statute has no applicability here.[2] The statute by its own terms applies only to instances of constitutional violations by the transferor corporation (here, IPS). This appeal, however, involves a remedy for

---

[2] Because the State of Indiana has argued that the transfer statute is the only available means for implementing the federal court order, we are required to interpret the statute to determine whether it applies to these facts.

interdistrict violations for which the State of Indiana, not IPS, is responsible. 637 F.2d at 1108. The statute does not address the situation where the State of Indiana is the wrongdoer.

In addition, the situation that triggers the transfer statute is now a legal impossibility. In *Milliken v. Bradley*, 418 U.S. 717 (1974), the Supreme Court held, in effect, that a unitary school system can always be established within the geographical boundaries of the school district that committed the *de jure* segregation. 418 U.S. at 745-46. The Court held that district courts cannot remedy *de jure* segregation confined to one school system by transferring students outside that system. *Ibid.* The transfer act was passed prior to *Milliken I* and makes sense only in light of pre-*Milliken I* jurisprudence.

For both of these reasons, therefore, the transfer statute is inapplicable.

C

Even if the transfer statute applied, the district court would not be bound by its terms. The state notes that the Tenth Amendment as well as basic principles of federalism gives it inherent authority to structure its finances. The transfer statute, it argues, is a financing statute that was duly enacted by the Indiana General Assembly, and so must be followed.

We reject this argument. The State of Indiana, and only the State of Indiana, has been found liable for the interdistrict violations. The cost of remedying these violations is the issue before this court. The state is asserting that, despite the fact that it alone has been adjudicated the wrongdoer, it can limit the power of a federal court acting in equity to remedy violations of the federal Constitution. This is not the law. In *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), the Chief Justice, writing for the Court, stated:

> The Tenth Amendment's reservation of non-delegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourthteenth Amendment. *Cf. Fitzpatrick v. Bitzer*, 427 U.S. 445, L.Ed.2d 614, 96 S.Ct. 266 (1976). Nor are the principles of federalism abrogated by the decree.

433 U.S. at 291. As Justice Powell also observed:

> Ordinarily a federal court's order that a State pay unappropriated funds to a locality would raise the gravest constitutional issues.... But here, in a finding no longer subject to review, the State has been adjudged a participant in the constitutional violations, and the State therefore may be ordered to participate prospectively in a remedy otherwise appropriate.

433 U.S. at 295 (Powell, J., concurring) (citations omitted).

The state's reliance upon *Evans v. Buchanan*, 582 F.2d 750 (3d Cir. 1978), is inapposite. In *Evans* the court of appeals reversed the district court's action of setting a local property tax rate at a level different from that imposed by the state legislature. It held that the district court gave insufficient deference to the broad authority of a state to establish levels of taxation. Our situation is quite different. The district court has not attempted to restructure state or local taxation. It has neither established tax rates nor mandated a particular method of determining tax rates. The district court has only forbidden the state from shirking its responsibility for the costs of remedying its wrongdoing.

II

As an alternative ground the state argues that the district court abused its discretion by requiring the state to pay the entire cost of the desegregation plan. The state admits that in equity cases, and especially in school desegregation cases, the trial court has broad discretion in

fashioning remedies. It contends, however, that the school districts in Marion County are also liable for the constitutional violations and so should share the cost of remedying them. We disagree.

The issue here is who shall pay for the desegregation plan ordered by the district court for interdistrict violations.[3] Only the State of Indiana was found liable for these violations. 637 F.2d at 1108. IPS and the other school districts in Marion County were found *not* liable for them. 637 F.2d at 1112. Given these findings, we do not see how the district court could have ruled any other way on the issue of financial liability.[4] It is a basic equitable principle that the wrongdoer is liable for the cost of rectifying his wrongful conduct. The fact that a court's equitable remedies implicate state funds is no bar to the court's exercise of its equitable powers. *Hutto v. Finney*, 437 U.S. 678 (1978); *Milliken v. Bradley*, 433 U.S. 267, 289 (1977); *New York State Assoc. for Retarded Children, Inc. v. Carey*, 596 F.2d 27, 39 (2d Cir.), *cert. denied*, 444 U.S. 836 (1979). The state alone is liable for the interdistrict violations that gave rise to the desegregation plan the cost of which is at issue on this appeal. The wrongdoer cannot evade the cost of remedying its wrongdoing.

The state's reliance upon *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*); *Liddell v. Board of Educ. of City of St. Louis*, No. 80-1458 (8th Cir., Fed. 13, 1981); *Reed v. Rhodes*, 500 F. Supp. 404, 425-26 (N.D. Ohio 1980), *aff'd*, 662 F.2d 1219 (6th Cir. 1981); and *Penick v. Columbus Board of Education*, 519 F. Supp. 925, 942 (S.D. Ohio 1981), *aff'd*, 663 F.2d 24 (6th Cir. 1981), is misplaced. First, all these cases involved intradistrict violations. Second, in all

---

[3] As noted previously, the issue of remedying intradistrict violations in IPS is not before the court in this appeal.

[4] We cannot allow relitigation of the issue of liability through discussion of remedies.

these cases the local school districts, as well as the states, were found to be wrongdoers. In those cases, therefore, it was equitable to divide the financial burden between the state and the local school districts. Here only the state was found liable for interdistrict violations. The district court did not abuse its discretion.

III

The state also contends that the district court erred in allocating two specific costs to the state: (1) the cost of reimbursing IPS for its financial losses caused by the student transfers; and (2) the cost of the extracurricular transportation for the transferred students. The district court has broad discretion in fashioning equitable remedies for Fourteenth Amendment violations. Our standard of review is whether the district court abused its discretion.

The district court found that IPS will suffer losses because of the one-way transfer of students. The state made no showing that this factual finding was clearly erroneous. The state contends that the formula used to compute IPS's losses is arbitrary. Nonetheless, there is ample support in the record for the validity of the formula. We find no abuse of discretion.

Desegregating extracurricular programs is necessary when desegregating school districts. *See Green v. County School Board*, 391 U.S. 430, 435 (1968). The state admitted at oral argument that for many of the transferred students the distance from the suburban schools to their homes is very great. Participation by these students in after-school programs would be extremely difficult without transportation. Moreover, only black students are being transferred; not providing them with extracurricular transportation would place an added burden on innocent black children.

The fact that the Indiana General Assembly has not

chosen to finance extracurricular transportation for any school district is irrelevant. We previously rejected this argument in a similar context. In an earlier order the district court held that certain ancillary, in-service programs were necessary to ensure effective implementation of its interdistrict remedy, and it directed the state to pay the costs that were not paid by federal funds. 506 F. Supp. at 674. On the authority of *Milliken II*, we rejected the state's argument that the court could not order the state to implement these programs because the general assembly had not appropriated money for these types of programs in any school district. 637 F.2d at 1116. Parallel reasoning supports the district court's order here. The court found extracurricular transportation necessary for effective implementation of its plan; that finding justifies requiring the state to pay the cost.

The state has not challenged the educational value of the extracurricular activities. It has not challenged the necessity of extracurricular transportation to prevent the exclusion of black IPS students from after-school activities. The state has failed to demonstrate that the district court abused its discretion.

IV

Finally, the state challenges paragraph 6 of the plan. The paragraph states:

> *Source of Funds.* All payments required to be made by the State under the provisions of this Plan shall first be paid from funds not appropriated for any other purpose. In particular, payments made by the State under this Plan shall not, except where otherwise provided herein, reduce in any manner payments or distributions from State funds to which any of the school corporations which are parties to this Plan are, or would be, entitled under applicable law if no students had been transferred for educational purposes, nor shall any payments hereunder reduce

> distributions to which any other school corporation in the State of Indiana is entitled under applicable law.

The state argues that this provision is an improper invasion of its sovereignty. We disagree.

When the district court entered its order the Indiana General Assembly had already adjourned after enacting appropriations for fiscal year 1981. The Indiana Constitution permits state officials to expend money only in accordance with appropriation. Indiana Constitution. Art. 10 § 3. Paragraph 6 was necessary, therefore, to ensure that the affected school districts would not have to use their regular allotments to pay the cost of the desegregation plan during the period before the general assembly resolved the financing issue. Absent this provision of the order, state officials would lack funds to make the payments required by the plan.

Moreover, the provision does not prevent the Indiana General Assembly in the future from allocating funds in any way it chooses so long as it appropriates sufficient funds for the desegregation plan. Paragraph 6 only prevents the General Assembly from carving out the funds for the desegregation plan from a school district's regular appropriations. To force IPS and the suburban school districts to finance the plan out of their regular appropriations would reduce the amount of money that they would have for educational purposes below the level that all other school districts in the state would have. *See* Ind. Code §§ 21-3-1.6-1 *et seq.* and §§ 21-3-3.1-1 *et seq.* The court's provision forbids the General Assembly from discriminating in this way against the students in the school districts subject to the court's desegregation order. Innocent black children in IPS have suffered enough. This court cannot countenance their being further victimized by requiring them to pay the cost of remedying their own injuries. The district court did not abuse its discretion. *See, Griffin v. County School Board*, 377 U.S. 218, 233 (1964).

The General Assembly retains its authority over school financing subject only to the requirement that it adequately support the desegregation plan. The court's order does not limit the power of the General Assembly to reallocate state funds for all functions of state government, including the general support of local public schools, in light of the court-ordered obligations. The General Assembly may reduce appropriations for other governmental functions, or raise taxes. It is not the province of a federal court to instruct the legislature on how it should finance its obligations. The district court did not attempt to do so. The court did what was within its authority — order a wrongdoer to pay the cost of remedying its wrongdoing.

The district court's order is affirmed.

POSNER, *Circuit Judge*, dissenting. The district court's order which this court affirms places on the State of Indiana the entire cost of court-ordered busing of black schoolchildren from schools of the Indianapolis Public School District (IPS) to schools in suburban Marion County. In addition, the order forbids the state to defray any part of that cost out of its appropriations for education; at least that is the only meaning I can assign to paragraph 6 of the district judge's plan, which this court does not purport to modify.

With all due regard for the forcefully articulated contrary view of my brethren, I am not persuaded that the order below is an appropriate exercise of the federal equity power. As a judgment of this sort is inescapably particularistic, I shall not attempt to review the decisions in other circuits dealing with the financing of busing decrees; none appears to involve facts similar to those of the present case.

This lawsuit, begun in 1968, initially charged just IPS with maintaining a system of segregated public schools, in violation of the Fourteenth Amendment. In 1969 the

Indiana legislature, by the legislation known as "Uni-Gov," extended the boundaries of Indianapolis to be coterminous with those of Marion County, except that the boundaries of the Indianapolis public school system were not extended. As a result of the movement of whites from the old city limits of Indianapolis to the Marion County suburbs that were now part of the city, by the time the district judge was ready to issue a remedial decree in this litigation the public schools of IPS were so predominantly black that he thought a decree limited to those schools would simply drive the remaining whites out of IPS. He therefore included in the decree a provision directing the busing of black schoolchildren from IPS to suburban Marion County schools. He also invited the Indiana legislature to enact legislation to fund the decree. The legislature responded by passing the "Transfer Statute," Ind. Code §§ 20-8.1-6.5-1 *et seq.*, in 1974. This statute provides that if a public school district is found to have violated the Fourteenth Amendment and is ordered to bus students outside it, the costs of busing are to be divided between the district and the state. Although IPS was not named in the statute, it was the "transferor corporation" that the draftsmen had in mind.

At about the same time, *Milliken v. Bradley (Milliken I)*, 418 U.S. 717 (1974), was decided. It held that busing outside a local school district's boundaries was not a proper remedy for a violation committed by the district alone unless the violation had caused racial segregation between districts; if not, an interdistrict busing order was proper only if the state or some other entity had committed its own constitutional violation that had caused interdistrict segregation. As a result of *Milliken I*, the order in this litigation directing the busing of black schoolchildren from IPS to the suburban schools had to be remanded for a determination whether the State of Indiana or some state agency was guilty of segregation or, if not, whether IPS itself had caused the interdistrict segregation. On remand

the district court found that neither IPS nor the suburban school districts had caused it but that the State of Indiana and one of its agencies, the Housing Authority of Central Indiana (HACI), had, and thus interdistrict busing was a proper remedy. HACI had refused to place public housing, which would have been occupied largely by blacks, anywhere in Marion County beyond the boundaries of IPS; this had contributed to keeping the suburbs of Marion County white. And through the schools exception to Uni-Gov the State of Indiana had prevented IPS from expanding to take in the white suburban schools, which would have allowed busing throughout Marion County to be ordered consistently with *Milliken I* because the entire county would have been a single school district.

Since the State of Indiana has been found liable for intentional segregation of the public schools, the district court's interdistrict busing order is valid. With that determination, affirmed by this court in 1980 in *United States v. Board of School Comm'rs*, 637 F.2d 1101, 1116 (7th Cir. 1980), this litigation should have ended. But last summer, with the busing order scheduled to take effect in the fall, several of the Marion County suburban school districts petitioned the district court for an order assigning the costs of the busing (not just transportation costs, but more important, the costs of educating the bused students) to the state. The state had planned to allocate those costs in accordance with the Transfer Statute, which would have placed roughly half the cost on IPS and half on the state. It is not entirely clear why the suburban school districts were dissatisfied with this method of allocation; and perhaps their petition should have been dismissed for failure to demonstrate irreparable injury. But apparently they were afraid that the state would refuse to appropriate any extra money for busing, with the result that any costs not picked up by IPS might have to be paid out of the education budgets of the transferee corporations, i.e., the suburban school districts. I am not at all clear how this might come

about, since the principal cost entailed by the busing order is the cost of educating the bused children and the Transfer Statute puts this cost on IPS rather than the state. But I shall pass this point and assume that the suburban school districts have a reasonable basis for concern that the Transfer Statute, if applied, would place significant costs on them.

The issue in this appeal is not the validity or enforcement of the busing order — all of the parties affirm that the order is being and will continue to be complied with — but only the allocation of the costs of compliance; and I submit that how the State of Indiana chooses to pay for busing is, at least in the first instance, the business of the State of Indiana rather than the federal courts. Cf. *Evans v. Buchanan*, 582 F.2d 750, 778-80 (3d Cir. 1978). It would become our business only if the state decided to make the black people against whom the defendants in this litigation have been found guilty of discriminating defray the costs of the injunction in their favor, or if the state otherwise sought to thwart the busing order. I agree that "Innocent black children in IPS have suffered enough," as my brethren put it. But it is premature to conclude that the Transfer Statute would make them suffer more. We do not know what measures IPS would take to pay off its share of the costs of busing — what tax or other resources for financing are available to it — or how the suburban school districts would pay for their share, whatever it may be. We do not even know whether the Indiana courts would hold the Transfer Statute applicable.

My contention that the financing issue ought to be left to the state to resolve derives from the nature of our federal system, which implies that interventions by federal courts into the processes of state government ought to be minimized, but more simply from traditional notions of equity jurisprudence. The end of an equity suit is an injunction, or if the injunction is not obeyed a contempt proceeding; it is not an inquiry into who will bear the costs

of the injunction. Suppose a company was found to have violated Title VII of the Civil Rights Act of 1964 by paying its black workers less than its white workers, and an injunction forbidding the discrimination was entered. No one would ask where the company was going to get the money to pay higher wages to its black workers (presumably the market would not let it just lower the whites' wages to the blacks' level) — whether it was going to raise prices and reduce output, or use more labor-saving machinery and reduce its work force, or reduce dividends, or what have you. These are fascinating questions for economists, but too difficult and tangential to engage the attention of courts, as the Supreme Court has held in dealing with comparable issues of "incidence" in the antitrust field. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 732, 741-42 (1977). Only if the company attempted to comply with the injunction by committing a fresh act of discrimination, as by firing its black workers, would the question of how the costs of the injunction were being defrayed come before the court that had issued the injunction. I do not see why the result should be different in this case. A defendant that happens to be a state of the United States is entitled to as much consideration as a private corporation.

So the district court should in my view have dismissed the petition asking it to devise its own scheme for allocating the costs of the busing order. If the petitioners want to challenge the application of the Transfer Statute let them do so in state court. The courts of Indiana may hold the statute inapplicable. It is premature for the federal courts to get involved in the matter.

But if I am wrong and the proper thing to do in this case was to apportion the costs of the busing order among the various wrongdoers, the district court should have used greater realism in making the appointment. In placing on the State of Indiana the full costs of rectifying the interdistrict violation (to simplify discussion I shall ignore

the role of HACI, as did the district court in its appointment plan), the court treated the state as if it were an individual that had promulgated Uni-Gov, with its schools exception, in the manner in which Louis XIV ("L'Etat, c'est moi") ordered the construction of the Palace of Versailles. The "state" was responsible; "it" should pay; the other "guys" — IPS and the suburban school districts of Marion County — were blameless and should suffer no diminution in their educational appropriations as a result of the state's misconduct.

All this is a vast oversimplification. I put to one side the fact that there never would have been an Indianapolis school litigation or an interdistrict busing order had it not been for the violations of the Fourteenth Amendment that IPS was committing as late as 1971; for it was against IPS and IPS alone that this suit was originally brought. I am thus willing to indulge the heroic assumption that IPS is without any legal or moral responsibility for the busing order. Therefore, if contrary to my view it really is our business to decide how the costs of complying with the busing order should be apportioned, then I agree that we should reject the approach in the Transfer Statute — even though that statute was passed at the behest of the district judge presiding over this litigation — because it assumes that IPS is the chief wrongdoer. But what we cannot ignore, if we are to do equity, is the role of the Marion County suburbs in the principal act of interdistrict discrimination found in this litigation — the exclusion of the suburban public schools from Uni-Gov.

I know that the suburban school districts were absolved from any share of legal liability for the segregation of the Marion County schools. Not only have I no desire to reopen the liability question, but as an original matter I would consider it highly unlikely that a school district could cause, and so in a legal sense be liable for, segregation between districts, as distinct from segregation within a district. To cause segregation between districts you have to

be able to keep black people from moving into a district, which is something beyond the power of a school board.

But the issue before us is not liability. The suburban school districts are asking for extraordinary equitable relief. To see how extraordinary, consider the following variation of my earlier hypothetical case of a company found to have violated Title VII. Suppose there had been two defendants originally, the company and the union representing its employees, but the union was absolved from liability. And suppose that after the company had been found liable and ordered to desist from further discrimination, it had raised the wages of its black workers, and since its total wage bill was now higher had reduced its work force, thereby laying off some members of the union. If the union came into court asking for a decree forbidding the company to pass on to its workers, in the form of job lay-offs, any part of the costs of complying with the antidiscrimination decree, it would not be heard to argue that the court's judgment absolving it from liability *compelled* the court to grant it the extraordinary remedy that it was seeking. A further inquiry would be necessary. Similarly, in this case we should consider whether the suburban school districts are in good conscience entitled to the extraordinary equitable relief that they are seeking.

In so considering, we should recognize that the actions of school boards are only one manifestation of the desires of the people of suburban Marion County; the votes of their representatives in the Indiana legislature are another relevant manifestation. Now no one, I take it, thinks that the reason why IPS's boundaries were not expanded to embrace the whole of Marion County was that the voters of South Bend or Fort Wayne or Evansville, who will share the cost of the busing decree under the order affirmed today, wanted the public schools of suburban Marion County to remain white. The schools exception to Uni-Gov was procured by the legislators elected by the people of suburban Marion County. This is not only obvious but was

found as a fact by the district court in this litigation. The "Mayor [of Indianapolis], testifying as a witness, gave no educational or governmental reason for excluding the [suburban] schools from the reach of Uni-Gov. He simply (and no doubt accurately) stated that the Uni-Gov bill would not have passed had the schools been included. The inference is that the representatives elected by the vote of suburban residents — many of whom had recently moved to the suburbs from the central city to escape the threat of desegregation posed by the filing of this very suit in 1968 — would have voted against Uni-Gov but for exclusion of the schools." *United States v. Board of School Comm'rs*, 456 F. Supp. 183, 187 (S.D. Ind. 1978).

Thus, so far as segregation between school districts is concerned, which is all that is before us in this appeal, it is the residents of the white suburbs of Marion County who are the primary wrongdoers, as a matter of equity if not of law, for there would be no need for an interdistrict busing order without the schools exception in Uni-Gov and there would be no schools exception but for the actions of the white voters of suburban Marion County. As the district court stated in another of its opinions in this litigation, "the suburban Marion County units of government.... have consistently resisted the movement of black citizens or black pupils into their territory. They have resisted school consolidation, they resisted civil annexation so long as civil annexation carried school annexation with it, they ceased resisting civil annexation only when the Uni-Gov Act made it clear that the schools would not be involved. Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both the officals and inhabitants of such areas has been to discourage blacks from seeking to purchase or rent homes therein...." *United States v. Board of School Comm'rs*, 419 F. Supp. 180, 182-83 (S.D. Ind. 1975). In light of this

history, for the suburban school districts, which are apparently among the richest in the state, to urge that the costs of the busing order should be borne by the people throughout the state who are dependent on the noneducational appropriations in the state budget and that the educational budgets of Marion County should be sacrosanct is to invoke the spirit not of equity but of effrontery.

But as I said before, rather than get into the tangled and recriminatory business of who shall pay for this court-ordered busing, we should say: "This litigation ended, at long last, when the district court's busing order was upheld by this court and certiorati was denied. Let the State of Indiana worry about who shall bear the costs of complying with the order. It is not a matter for the federal courts unless the state should devise a method of financing that discriminates against the black people who are the intended beneficiaries of the order. Other than in a purely technical sense there is no federal question before us today."

Such a disposition of this case would not be contrary to *Milliken II*, which holds that a federal court does not violate the Tenth or Eleventh Amendments when it decides how the costs of a busing decree shall be borne. *Milliken v. Bradley*, 433 U.S. 267, 288-91 (1977). It does not follow that because a federal court has the power to tell a state how to finance a busing decree it should exercise that power in a particular case or in a particular way. I would reverse.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

June 22, 1982

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, and DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, etc. *Intervening Plaintiffs-Appellees*	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 68 C 225 S. Hugh Dillin, Judge.
No. 81-2209 vs.	)	
THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al., *Defendants-Appellees*, and ROBERT D. ORR, as Governor of the State of Indiana, et al., *Added Defendants-Appellees*	)	

On consideration of the petition for rehearing and suggestion for rehearing en banc filed by counsel for the appellants, and the answer filed by counsel for the plaintiff and intervening plaintiffs, no active member of the court has requested a vote on the suggestion for an en banc rehearing. All members of the original panel have voted to deny the petition for rehearing.

IT IS ORDERED that said petition for rehearing and suggestion for an en banc rehearing be, and the same are hereby DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, *Plaintiff,*	)	
DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY. etc., *Intervening Plaintiffs,*	)	
vs.	)	NO. Ip 68-C-225
THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al., *Defendants,*	)	
OTIS R. BOWEN, as Governor of the State of Indiana, et al., *Added Defendants.*	)	

JUDGMENT

The Court having on July 17, 1981, filed its Memorandum of Decision in the above-entitled cause containing various findings requiring an order and judgment, it is hereby ordered and adjudged as follows:

1. This Court's Judgments entered July 9, 1979, Nos. IP 68-C-225 A through F, and I through K, as modified by its orders entered January 26, 1981, May 9, 1981 and April 22 and 29, 1981, are further modified in accordance with the "Financing Plan - Desegregation Judgments" (the "Plan"), which is attached hereto and made a part of this Judgment.

2. This Judgment will not be stayed by this Court, and if stayed by any other Court the payments to be made under Plan by the State will be paid by the Board of School Commissioners of the City of Indianapolis which will be entitled to a right of reimbursement from the State.

3. The Court retains continuing jurisdiction of this action and the parties hereto, together with the right to modify or supplement any orders or judgments herein or heretofore made.

Dated this 17 day of July, 1981.

/s/ S. Hugh Dillin

Judge, United States
District Court

FINANCING PLAN — DESEGREGATION JUDGMENTS

1. *Application of this Plan.* This Plan provides for financing transfer of pupils from IPS to adjoining school corporations. This Plan applies to The Metropolitan School Districts of Decatur, Lawrence, Perry, Warren and Wayne Townships, Marion County, Indiana, and Franklin Township Community School Corporation (herein referred

to as the Receiving School Corporations), the Board of School Commissioners of the City of Indianapolis (herein referred to as IPS), and the State of Indiana, acting through its officials joined in this suit as defendants (herein referred to as the State).

This Plan implements and modifies the separate judgments of this Court entered July 9, 1979, ordering the transfer of students from IPS to the Receiving School Corporations, and identified as follows:

No. IP 68-C-225 A - Relating to Decatur
No. IP 68-C-225 B - Relating to Franklin
No. IP 68-C-225 C - Relating to Lawrence
No. IP 68-C-225 D - Relating to Perry
No. IP 68-C-225 E - Relating to Wayne
No. IP 68-C-225 F - Relating to Warren

(herein referred to as the Judgments), as modified by this Court's March 9, 1981, order relating to the areas in IPS from which black pupils are to be transferred, the separate judgments numbered IP 68-C-225 I. relating to the assignment of teachers, IP 68-C-225 J, relating to the adoption of an in-service training, IP 68-C-225 K, relating to the development and administration of an in-servcice training program, the separate order entered January 26, 1981, relating to in-service training and orientation programs, and the orders approving the distribution of IPS pupils to the Receiving School Corporations entered April 22 and 29, 1981.

2. *The Plan.* The purpose of this Plan is to allocate the costs of implementing the Judgments and supplemental orders and to modify the responsibility for transportation, as follows:

(a) With respect to children in the transfer areas, provides for the payment by the State of transfer tuition for their education not otherwise received by IPS, the payment of transportation costs for regular school and after-school extracurricular programs, and payment of other costs of

desegregation incurred by the Receiving School Corporations.

(b) Provides that interdistrict transportation will be performed by IPS, unless it is assumed by a Receiving School Corporation.

(c) Provides for allocation of federal grants not related to desegregation.

(d) Provides for the school assignment of black children moving from or to a transfer area in IPS.

3. *Definitions.* For ease of reference in applying the fiscal criteria necessarily incident to the Plan, the following definitions will be used:

"ADM" means enrollment for a school year as computed and reported under the provisions of IC 21-3-1.6-1.1. ADM may be applied either to an entire school corporation or to a transfer area.

"State support" means for each school year all state tuition grants, flat grants and other state revenues distributable to local school corporations from state funds, except distributions for transportation and reimbursable programs such as summer school and adult education. State support calculated on a calendar year basis shall be apportioned, where necesssary, for the school year by dividing it in half.

"Local taxes received by IPS" means the amount of property taxes levied and collected by it on real property and business personal property, the amount of motor vehicle and bank and savings and loan excise taxes collected by it and amounts paid or credited to the school corporation which are levied on a county-wide or local basis, except amounts receipted to the school transportation fund and amounts equal to IPS expenditures from such taxes for summer school and adult education. Taxes levied or paid on a calendar year basis shall be apportioned for the school year,

where it is necessary, by dividing them in half. These local taxes may be broken down for each accounting fund to which they are receipted. Except where otherwise specifically provided, taxes used in calculating receipts for any period include taxes attributable to that period and paid at the final settlement thereof occurring after the end of the period.

"Federal support" consists of grants directly or indirectly attributable to pupils in a transfer area, or schools attended by these pupils unrelated to desegregation.

"Transfer area" means an area in IPS designated in the Court order from which IPS pupils are to be transferred to a Receiving School Corporation.

"Transfer tuition" or the "amount of transfer tuition" refers to the amount of the total direct and indirect costs and other related expenditures incident to carrying out the desegregation contemplated by this Plan in support of the education of students from the transfer area for each class of school as defined and applied in IC 20-8.1-6.1-8 as it existed on January 1, 1981, under the rules, regulations and forms thereunder then in effect, based on the number of days in each school year the students are enrolled in the Receiving School Corporation.

"Transportation costs" means cost for capital outlay, operation, maintenance, insurance and any other costs relating to student transportation for regular school activities and for participation in extracurricular school activities, including but not limited to, students in vocational and special education classes.

"Desegregation costs" means costs of implementing the Judgments and this Plan, whenever incurred, except,

(i) Transfer tuition and transportation costs, and

(ii) Any part of such costs which are reimbursed by Federal grants, subject to the provisions of this Court's Memorandum of Decision dated April 24, 1979, relating to these costs.

"General fund per capita cost" means total general fund expenditures (including amounts withheld from state support otherwise due IPS attributable to the operating cost portion of transfer tuition pursuant to Paragraph 5(a)(1) and excluding food service accounts and any non-recurring capital expenses incurred or paid in relation to implementation of any order of the Court in IP 68-C-225) for the school year beginning July 1 and ending June 30, as reported on the Biannual Reports submitted by each school corporation to the Department of Public Instruction, divided by the ADM of the school corporation for the same school year as determined under I.C. 21-3-1.6-1.1.

"Residence" or "resident" with respect to whether a child has moved into or out of a transfer area shall be determined in accordance with the rules for determining whether the legal settlement of a child is within or without a school corporation under IC 20-8.1-6.1-1.

4. *Allocation of Responsibilities.*

(a) Each Receiving School Corporation shall be responsible for educating the children resident in the applicable transfer area in grades 1-9 beginning with the 1981-1982 school year and continuing education of these children one grade per year for three years through grade 12 and for grades 1-12 thereafter.

(b) Transportation of transferred IPS pupils will be afforded both for regular school programs and after-school extracurricular programs, including but not limited to students in vocational and special education classes, in the

grades provided by subparagraph (a) beginning with the 1981-82 school year. Transportation of pupils will be afforded both for regular school programs and after school programs between points in each transfer area reasonably convenient to the homes of the transferred students and the assigned school in the Receiving School Corporation. Transportation for after-school programs may be to points within a transfer area more centralized than transportation for regular school programs. IPS shall be responsible for providing this transportation, except where a Receiving School Corporation exercises its option to assume that responsibility in accordance with this Plan. The school corporation providing the transportation will have the responsibility for discipline on the school bus. This includes suspension or expulsion from school and the other permitted disciplinary remedies, following any procedures required, under IC 20-8.1-5 and other applicable law. Where IPS provides the transportation, it will coordinate the transportation with the various time and date requirements of the applicable School Corporation.

(c) Commencing in the school year 1981-1982 by written notice given to IPS and filed with this Court on or prior to July 21, 1981, each Receiving School Corporation has the option with respect to students transferred to it under this Plan, to furnish all the transportation required by the Plan, transportations for regular school programs, or transportation for after-school programs for students from a transfer area necessary to implement the Plan. Any Receiving School Corporation exercising this option will pay IPS, at its request, its cost for the thirty (30) new buses in its possession or on order, which are to be used for transportation of students from a transfer area to that Corporation and are rendered surplus because of the exercise of the option. Any Receiving School Corporation may exercise this option to commence any of such transportation in a later school year but only upon such equitable terms as this Court approves by a modification of

this Plan. This transportation may also be provided either by IPS or the Receiving School Corporation, or divided or allocated between IPS and the Receiving School Corporation in any manner which may be agreed between them. IPS will provide all transportation necessary to implement this Plan for which any Receiving School Corporation has neither agreed to nor exercised an option to provide.

(d) Student records for students in each transfer area have been delivered to the applicable Receiving School Corporation, and these students shall enroll in the assigned school in the Receiving School Corporation, unless they are excused under this paragraph or the provisions of IC 20-8.1-6.1-8(b) or unless they enroll in a non-public school Where a black student changes residence into or out of a transfer area, the student shall be afforded rights to be educated in the Receiving School Corporation comparable to the rights of a student moving into or out of a school corporation to be educated in that school corporation under IC 20-8.1-6.1-1(g). Under this provision, students, changing residence out of a transfer area during a school year, are entitled either: (i) to be enrolled in the school whose attendance area includes their new residence or (ii) at their or their parents' election be educated in the Receiving School Corporation school which they are attending before the move, until the end of the semester in progress at the time of the move or, at the discretion of that school corporation, until the end of the school year. Students finishing the eleventh grade in a Receiving School Corporation may despite a move after that time, at their or their parents' election, continue education in the school which they attended at the time of the move for the entire year. IPS and each Receiving School Corporation will advise each other of students changing their residence from or to a transfer area and will cooperate in seeing that the students thus moving are properly placed in school in accordance with the provisions of this Plan. For an

unemancipated student no changes of the student's residence under this paragraph will be effective, (i) unless the change is incident to a residence change by the student's parents, or (ii) unless IPS and the Receiving School Corporation find a notation in the student's records that the student's residence change was not made primarily for the purpose of attending in another school district.

(e) Where a student moves out of a transfer area and under the terms of this provision is entitled to be educated for a semester or a school year in a Receiving School Corporation, the responsibility for transporting the student to the Receiving School Corporation will be limited to transferring that student to the Receiving School Corporation from the closest point in the transfer area to his changed residence. Additional transportation from the student's changed residence outside the transfer area to and from the transfer area shall be provided by the parents of the student, or the student if the parents are no longer responsible for the student.

5. *Allocation of Costs and Funds.*

(a) Since the Court has found that the State has been responsible for the constitutional violations giving rise to the interdistrict remedies ordered by the Court and implemented in part by the provisions of this Plan, the State shall make the following payments to IPS or the Receiving School Corporations as reimbursement for costs they incur in implementing the Plan:

(1) *Tuition Payments to the Receiving School Corporations.* Beginning with the school year 1981-82, transfer tuition for the IPS students transferred from a transfer area, or entitled to be transferred in accordance with paragraph 4, excepting, however transfer tuition for military dependents otherwise paid under IC 20-8.1-6.1-6(b). Transfer tuition will be paid to the Receiving School Corporation without deduction for any

State support, but with deduction for the amount of Federal impact aid received by the Receiving School Corporation and attributable for the applicable school year to the transferred students. Any dispute on the amount of transfer tuition may prior to but subject to a determination under the provisions of paragraph 8, be submitted by the State to its commission on general education pursuant to IC 20-8.1-6.1-10, but shall be subject to re-determination under paragraph 8.

The State shall reimburse itself for the transfer tuition thus paid by it from the State support otherwise due IPS, in the amount equal to the lesser of the following computations:

(A) The total amount of transfer tuition payable to all Receiving School Corporations for the applicable school year; or

(B) The sum of (i) State support, except under this subparagraph (a), due IPS for the applicable school year divided by the ADM of IPS for the same school year and multiplied by the total number of pupils for whom transfer tuition is paid by the State under this paragraph, plus (ii) local taxes received by IPS during the fiscal year which corresponds to the applicable school year, divided by the ADM of IPS for the same school year and multiplied by the number of pupils for whom transfer tuition is paid by the State under this paragraph. ADM of IPS for this provision includes all pupils residing in a transfer area who are transferred to a Receiving School Corporation for educational purposes.

(2) *Transportation Costs.* Transportation costs for pupils transferred from an IPS transfer area, including costs incurred before the 1981-82 school year in preparation for implementation of the

Judgments, in the amounts expended either by IPS or a Receiving School Corporation.

(3) *Other Desegregation Costs.* All other desegregation costs as defined in paragraph 3.

(4) *Increased IPS Per Capita Costs Resulting from Plan.* Beginning with the school year 1981-1982, an amount equal to the increase in the aggregate per pupil cost in IPS over that increase in all school corporations of the state, attributable to the increased costs occasioned by the substantial loss in IPS enrollment resulting from implementation of this plan and the judgments, and the reduction in IPS staff as required by the transfers of students and the Court's judgment in IP 68-225 I. For ease of application this will be calculated in the manner used for calculating State distributions under State law as follows and shall be the amounts set out in Step No. 5:

STEP NO. 1. Calculate the excess, if any, of IPS general fund per capita cost for the current school year over the IPS general fund per capita cost for the school year 1980-81.

STEP NO. 2. Calculate the excess, if any, of the state general fund per capita cost for the current school year over the state general fund per capita cost for the school year 1980-81.

STEP NO. 3. Calculate the excess, if any, of the amount determined in Step No. 1 over the amount determined in Step No. 2.

STEP NO. 4. Compute the product of the amount determined in Step No. 3 multiplied by the ADM of IPS for the current school year.

STEP NO. 5. Compute the percent of Step No. 4 for the following school years:

Year	*Percent (%)*
1981-1982	100
1982-1983	75
1983-1984	50
1984-1985	25
1985-1986 and years thereafter	-0-

Any funds received by any school corporation under this Plan from the State may be deposited into any established fund, except that transportation costs for amounts other than capital outlay will be deposited in the Transportation Fund. IPS may at its discretion transfer from its cumulative building fund to its general fund any funds, not in excess of the amounts withheld under subparagraph (a)(1) above, by the State from State support otherwise due IPS and attributable to the capital cost of transfer tuition as defined in IC 20-8.1-6.1-8(d).

(b) For each school year commencing 1981-1982, in situations where Federal support is based in whole or in part on a count of students with specified characteristics and where the allocation of support is administered by the State, the State Superintendent of Public Instruction, or his designee, in counting students and allocating support for the Receiving School Coporation will count both applicable resident students and transfers from an IPS Transfer area enrolled in the Receiving School Corporation. The general intention is that support, subject to all applicable rules for the particular program, will follow the students. Where any allocation and payment of funds for a Federal support program in a Receiving School Corporation for the school year 1981-1982 depends on the number of students counted in a prior year, the count will include the number of such students in that year in the applicable IPS transfer area. Except for impact aid, costs of a Receiving School Corporation paid from funds received under a Federal support program will not be included in transfer tuition.

(c) Fees for schoolbooks, supplies or other required class fees for transferred IPS students entitled to payment of such fees by the school corporation under IC 20-8.1-9 (adopted by Indiana Acts 1979 P.L. 209) shall be collected by the Receiving School Corporation directly from the applicable township trustee. The Receiving School Corporation shall be responsible for collecting from the students or their parents all such applicable fees chargeable to the transferred students for whom eligibility for assistance under that chapter has not been established, in the same manner as from students or their parents resident in the Receiving School Corporation.

6. *Source of Funds.* All payments required to be made by the State under the provisions of this Plan shall first be paid from funds not appropriated for any purpose. In particular, payments made by the State under this Plan shall not, except where otherwise provided herein, reduce in any manner payments or distributions from State funds to which any of the school corporations which are parties to this Plan are, or would be entitled under applicable law if no students had been transferred for educational purposes, nor shall any payments hereunder reduce distributions to which any other school corporation in the State of Indiana is entitled under applicable law.

The Governor, Auditor and Treasurer of the State of Indiana, acting collectively as the State Board of Finance, shall authorize the payment of the charges to be paid by the State under this Plan, which are hereby ordered to be paid by the State. The Auditor shall thereupon draw his warrant upon the Treasurer and the Treasurer shall make payment of such monies to each Receiving School Corporation and IPS in the amounts and at the times set forth in this Order.

7. *Timing of Payments.* Subject to the provisions of paragraph 8 relating to resolution of disputes, all payments required to be made by any school corporation or by the

State under the provisions of this Plan shall be made in accordance with the following procedures:

(a) Payments required to be made by the State under paragraph 5 will be made on the basis of billings submitted by the Superintendent of each school corporation making the billing to the Superintendent of Public Instruction, who will review the statements and promptly submit them to the State Board of Finance for payment in accordance with paragraph 6.

(b) Billings for transportation, transfer tuition and for increased desegregation operational expenses, as described in paragraph 5, which are computed and billed on the basis of costs incurred or to be incurred for a particular school year, shall be paid in quaterly installments. Installments for the school year 1981-1982 and for each succeeding school year shall be paid at the times provided in IC 20-8.1-6.1-9 within ten (10) days of the first day of January, April and July in that school year and in October of the following school year. For each year at any time after July first and before the payment of the first installment in January, the State shall make an advancement to IPS or any Receiving School Corporation from installments to be made by the State in the next calendar year, based on the school corporation's cash flow needs, as determined and set out in its written request, not to exceed, however, one quarter (1/4) of the total estimated payment for the year due. Any such advance shall be made from monies the applicable school corporation is entitled to receive in the ensuing calendar year and shall not be considered a credit in determining the final amount due. Quarterly installments, except the final installment, shall be based on estimates of transfer tuition, transportation costs, and the per capita cost or other operational expenses derived from budgets and appropriations approved and advertised each current year (disregarding any advertised but unapproved excessive property tax levy under IC 6-1.1-19) and shall be adjusted during each school year to reflect

changes in the budgets and appropriations of school corporations as approved by the State Board of Tax Commissioners. The final installment shall reflect appropriate adjustments so that total payments equal the amounts payable under the provisions of this Plan, computed on the basis of actual costs and expenditures for the school year. Billings under this subsection shall be submitted for processing at least thirty (30) days prior to any due date and payment may be extended to the next regularly scheduled meeting of the State Board of Finance, if processing cannot reasonably be effected for any Board meeting held within the thirty (30) days. Payment shall not be delayed under this provision, however, for a period in excess of sixty (60) days from the date of submission of the bill. A copy of all such billings will be sent to IPS for information purposes.

(c) All reimbursement for capital outlay or equipment, and all payments which are not payable in quarterly installments on the basis of estimates as provided in subparagraph (b), shall be paid within thirty (30) days after the date of billing.

(d) Each Receiving School Corporation, and IPS, and the State Superintendent of Public Instruction shall submit to each party the appropriate information enabling each to make or confirm billings to be made by, incurred by, or paid to it, or in the case of IPS, deducted from it, as soon as the information is reasonably available to permit billing and payment.

(e) Amounts deducted by the State from State support due IPS, as reimbursement for transfer tuition payable to Receiving School Corporations, as provided in paragraph 5(a)(1), shall be based on estimates of IPS state support and local taxes anticipated to be received during the applicable school year, taking into account the previous experience of IPS regarding tax levies and collections, and shall be adjusted at the time of payment of final installments of

transfer tuition to reflect the actual amount of state support and local taxes received by IPS for the preceding fiscal year. Deductions attributable to transfer tuition for any school year shall be made in equal quarterly installments, subject to adjustments as provided herein, at the times the installments of transfer tuition are paid under subparagraph (b).

(f) To the extent any payment is not made to a Receiving School Corporation by the State when due including any extensions permitted hereunder, it shall be made by IPS, which shall then be entitled to immediate reimbursement from the State.

8. *Disputes.* In the event there is a dispute with respect to the computation or amount of any payment required to be made under the provisions of this Plan, the party required to make the payment, incur the expense, or to whom the billing is submitted under the provisions of paragraph 7 may, within thirty (30) days after payment is made, file a petition with the Court requesting a redetermination of the amount or liability for payment under the terms of this Plan.

Copies to:

Lewis C. Bose
1100 First Federal Building
Indianapolis, Indiana 46204

Richard L. Brown
156 East Market Street

Indianapolis, Indiana 46204

James B. Burroughs
2560 City-County Building
Indianapolis, Indiana 46204

Richard J. Darko
Suite 2410
One Indiana Square
Indianapolis, Indiana 46204

Charles W. Hunter
810 King Cole Building
Indianapolis, Indiana 46204

Harold E. Hutson
1322 Circle Tower
Indianapolis, Indiana 46204

Charles D. Kelso
3200 Fifth Avenue
Sacramento, California 95817

William E. Marsh
735 West New York Street
Indianapolis, Indiana 46202

Virginia Dill McCarty
United States Attorney
274 United States Courthouse
Indianapolis, Indiana 46204

John O. Moss
Suite 902
156 East Market Street
Indianapolis, Indiana 46204

Linley E. Pearson
Attorney General
219 State House
Indianapolis, Indiana 46204

Alexander Ross
Michael Sussman
Civil Rights Division
Department of Justice
Washington, D.C. 20530

Donald A. Schabel
Suite 3300
One Indiana Square
Indianapolis, Indiana 46204

William O. Schreckengast
380 Main Street
Beech Grove, Indiana 46107

John Preston Ward
Apartment 5
2951 North Capitol Avenue
Indianapolis, Indiana 42608

John Wood
500 Union Federal Building
Indianapolis, Indiana 46204

William L. Taylor
Center for National Policy
Rev.
Washington, D.C. 20064

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, *Plaintiff,*	)	
DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, etc., *Intervening Plaintiffs,*	)	
v.	)	No. IP-68-C-225
THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al *Defendants,*	)	
OTIS R. BOWEN, as Governor of the State of Indiana, et al., *Added Defendants.*	)	

MEMORANDUM OF DECISION

This cause comes before the Court once again as the school year 1981-82 approaches and black students residing in IPS are to be educated in the schools of certain of the Added School Defendants in Marion County, Indiana, pursuant to prior orders of this Court. The issue of which governmental agency or agencies shall bear the cost of such education and furnish the transportation necessary therefor is the subject of this Decision.

The Court has considered this matter in the context of the "Petition to Modify and Supplement Judgment with Respect to Payment of the Costs of Interdistrict Desegregation" filed by the Metropolitan School Districts

of Decatur, Lawrence, Warren and Wayne Townships, Marion County, Indiana, on June 19, 1981, and the separate motion of the Metropolitan School District of Perry Township, Marion County, Indiana, to modify the Judgment of this Court entered on July 19, 1979, filed June 17, 1981, the Responses of the Board of School Commissioners of the City of Indianapolis (IPS) to this Petition and Motion filed July 7, 1981, and the "Brief in Support of Plan of Desegregation Submitted by the Metropolitan School Districts of Lawrence, Warren and Wayne Townships" filed on May 21, 1981. It has heard evidence and considered arguments presented by these parties and also by the State through the Office of the Attorney General of Indiana and by the Intervening Plaintiffs, and now makes the following findings of fact and conclusions of law pursuant to Federal Rules of Civil Procedure 52(a).

1. IC 20-8.1-6.5, the 1974 Indiana Transfer Act, does not and cannot serve as a substantive source of authority for the remedial judgments of this Court. As stated in the 1980 Opinion of the Court of Appeals affirming the remedy ordered by this Court and reported in 637 F.2d at page 1112, this Act provides only "a mechanism for student transfers in cases where those transfers are ordered to remedy fourteenth amendment violations. It is not an independent source of authority to require student transfers and cannot, standing alone, be the basis for a desegregation order." To use this Indiana Transfer Act to assess the cost of desegregation would ignore the nature and cause of the constitutional violations found by the Court and would impose the burden of these costs on IPS despite the Court's finding, affirmed by the Seventh Circuit, that the acts of segregation by IPS did not cause interdistrict segregation. This Court found no constitutional violation by the Added School Defendants.

2. The basis of the interdistrict remedial orders of this Court are found in the constitutional violations of the State itself, culminating in the passage of Uni-Gov and Indiana Acts, Ch. 52, separating the long-standing unity of school and civil boundaries, both adopted in the 1969 Session of the Indiana General Assembly. The adoption of these statutes constituted "intentional state acts which had a significant impact across district lines;" (Ibid). and prevented or seriously inhibited IPS from expanding its own boundaries to cure the segregation within its borders previously found by Court. (Id. at 1104-9).[1]

3. The State of Indiana through its officials is a party to this lawsuit. Because the decisions of this Court found it responsible for interdistrict fourteenth amendment violations and fixed the remedy therefor, the State should be required to pay the costs of that remedy. These costs will be substantial, particularly in the first years of desegregation, but can be expected to decline when IPS is able to reduce its administrative costs as it adjusts in future years to this sudden drop in its enrollment in the 1981-82 school year. The State pays approximately $976,000,000 in tuition payments alone to Indiana schools each year at the present time. The additional cost of paying for the remedial interdistrict transfers ordered by the Court would not impose a punishing burden upon it. Such costs should be paid in addition to other funds appropriated by the State

---

[1] See 419 F. Supp. 180, 183 (1975); 573 F.2d 400, 405-408, 409 (1978), cert. den. 439 U.S. 824 (1978); 456 F. Supp. 183, 188, 189 (1978); 637 F.2d 1101, 1108, 1110 (1980), cert. den. *U.S.*, 66 L.Ed.2d 45 (1980). The State has further been a substantial factor in segregation within IPS by, among other things, its statutory authorization of IPS dual school system and its further participation in establishing that system, which it failed to take any effective affirmative action to dismantle. See 332 F. Supp. 655, 658-665 (1971); 368 F. Supp. 1191, 1199-1203, 1205 (1973); 503 F.2d 68, 80 (1974), cert den. 421 U.S. 929 (1975); 456 F. Supp. 183, 187 (1978).

for the public schools. *Evans v. Buchanan*, 582 F.2d 750, 780 (3rd Cir. 1978). IPS and the Federal Government have to date borne substantially all the substantial costs of desegregating IPS incurred over several years to date. IPS is in a deficit financial condition on a projected fiscal year basis with income from state support and from local taxation, for operations other than transportation, controlled by the State. IPS has one of the four highest school tax rates of the eleven Marion County school corporations, and the total civil and school rates in IPS are higher than in any school corporation in Marion County, Indiana, except the School City of Beech Grove.

4. The Court believes that an annexation of IPS territory as envisaged in the "Petition of the Metropolitan School Districts of Lawrence, Warren and Wayne Townships to Implement the Transfer of IPS Students by Transfer of Territory", filed May 21, 1981, (the "LWW Plan"), offers the best possibility for a successful and long lasting desegregation, and urges now as it has in the past that the members of the IPS Board of School Commissioners who opposed this LWW Plan reconsider their opposition. The Court will issue no ruling on this LWW Plan at this time, but will reserve judgment awaiting possible reconsideration by the IPS School Board.

5. The "Financing Plan - Desegregation Judgments" introduced in evidence as Exhibit DLWW 1 and DLWW 2, sets out a detailed proposal for the payment of these desegregation costs.

This Court hereby adopts this Financing Plan in the manner attached to and made a part of the Judgment of the Court. The Plan as submitted by the parties is adopted with the following modifications:

(a) As to transportation for extracurricular activities, black students from IPS will be transported to schools located in many cases greater distances from their homes in IPS than resident students in

the Receiving School Corportions, to avoid an unreasonably high concentration of black students in any particular school. Therefore, it is reasonable and proper that the IPS students be furnished transportation after school hours in order that they can participate in extracurricular activities at State expense, which activities are an integral part of their educational experience. *Green v. School Board of New Kent County*, (1968), 391 U.S. 430, 435; *Kelly v. Metropolitan City Board of Education* (M.D. Tenn. 1980), 492 F.Supp. 167, 196. Transportation for extracurricular activities for student residents in IPS and in the Receiving School is not now furnished, and need not be furnished in the future as a part of this desegregation plan. However, a bus transporting IPS students for extra-curricular activities can be used for resident students as well without charge to the Receiving School Corporation, if seats are available.

(b) Any Receiving School Corporation wishing to transport IPS students itself rather than have IPS furnish this transportation, either for the regular school day or for extra-curricular activities, or both, may do so. In particular, The Metropolitan School Districts of Lawrence and Warren Townships, Marion County, Indiana are authorized to furnish such transportation. The offer of the Metropolitan School Districts of Lawrence and Warren Townships, Marion County, Indiana to purchase from IPS four and ten respectively, of the thirty new buses now on order but not received, at cost, is available for acceptance by IPS. Any other Receiving School Corporation determining to furnish transportation for IPS students may submit its intention to do so in

writing to IPS on or before July 21, 1981, provided that each School Corporation also agrees to purchase its proportionate share of these sixteen (16) remaining new school buses IPS has ordered, based on its proportion of the total number of IPS students to be transported to the remaining four Receiving school corporations.

(c) IPS may recover its increased costs attributable to its loss in enrollment and reduction in staff on account of the remedial judgments of this Court, calculated in the manner set forth in paragraph 5(a)(4) of the Financing Plan which is a part of the Judgment of the Court.

6. The immediate implementation of the Financing Plan is necessary in order for the Receiving School Corporations to provide education for the transferred IPS students who will begin attending school in those Corporations in August, 1981. Prior to that time, the payments to be made to Receiving School Corporations in 1981 must, under Indiana law, be appropriated with approval by the Indiana State Board of Tax Commissioners. Failure to fund adequately the education and incidental transportation costs of the transferred IPS students will result in irreparable harm to those students and to the other students in the Receiving School Corporations and will also impair the public interest in an orderly implementation of the school desegregation ordered by this Court. Neither IPS nor the Receiving School Corporations have the funds necessary for this purpose..

7. It is suggested that the counsel for Intervening Plaintiff file their statement for legal services during the course of this litigation, at an early date. A ruling on the reasonableness of such fees and which party or parties are responsible for payment, following an opportunity for response by the other parties hereto, will thereafter be entered by the Court.

An appropriate Judgment will be entered in accordance herewith.

Dated this 17 day of July, 1981.

/s/ S. Hugh Dillin
Judge, United States
District Court

Copies to:

Lewis C. Bose
1100 First Federal Building
Indianapolis, Indiana 46204

Richard L. Brown
156 East Market Street

Indianapolis, Indiana 46204

James B. Burroughs
2560 City-County Building
Indianapolis, Indiana 46204

Richard J. Darko
Suite 2410
One Indiana Square
Indianapolis, Indiana 46204

Charles W. Hunter
810 King Cole Building
Indianapolis, Indiana 46204

Harold E. Hutson
1322 Circle Tower
Indianapolis, Indiana 46204

Charles D. Kelso
3200 Fifth Avenue
Sacramento, California 95817

William E. Marsh
735 West New York Street
Indianapolis, Indiana 46202

Virginia Dill McCarty
United States Attorney
274 United States Courthouse
Indianapolis, Indiana 46204

John O. Moss
Suite 902
156 East Market Street
Indianapolis, Indiana 46204

Linley E. Pearson
Attorney General
219 State House
Indianapolis, Indiana 46204

Alexander Ross
Michael Sussman
Civil Rights Division
Department of Justice
Washington, D.C. 20530

Donald A. Schabel
Suite 3300
One Indiana Square
Indianapolis, Indiana 46204

William O. Schreckengast
380 Main Street
Beech Grove, Indiana 46107

John Preston Ward
Apartment 5
2951 North Capitol Avenue
Indianapolis, Indiana 42608

John Wood
500 Union Federal Building
Indianapolis, Indiana 46204

William L. Taylor
Center for National Policy
Rev.
Washington, D.C. 20064

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA, *Plaintiff,*	)	
DONNY BRURELL BUCKLEY, ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein, *Intervening Plaintiffs,*	)	
INDIANA STATE TEACHERS ASSOCIATION, *Intervening Plaintiff,*	)	
-vs-	)	NO. IP 68-C-225
THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA; KARL R. KALP, as Superintendent of Schools; MARY E. BUSCH, as President of The Board of School Commissioners; WALTER KNORR, MARTHA L. McCARDLE, WILLIAM M.S. MYERS, W. FRED RATCLIFF,	)	

JAMES R. RIGGS,)
PATRICIA WELCH,)
Members of the Board of)
School Commissioners of)
the City of Indianapolis,)
Defendants.)
OTIS R. BOWEN, as Governor)
of the State of Indiana;)
THEODORE L. SENDAK, as)
Attorney General of the)
State of Indiana;)
HAROLD H. NEGLEY, as)
Superintendent of the Public)
Instruction of the State of)
Indiana;)
THE METROPOLITAN)
SCHOOL DISTRICT OF)
DECATUR TOWNSHIP,)
MARION COUNTY,)
INDIANA;)
THE FRANKLIN TOWN-)
SHIP COMMUNITY)
SCHOOL CORPORATION,)
MARION COUNTY,)
INDIANA;)
THE METROPOLITAN)
SCHOOL DISTRICT OF)
LAWRENCE TOWNSHIP,)
MARION COUNTY,)
INDIANA;)
THE METROPOLITAN)
SCHOOL DISTRICT OF)
PERRY TOWNSHIP,)
MARION COUNTY,)
INDIANA;)
THE METROPOLITAN)
SCHOOL DISTRICT OF)

WARREN TOWNSHIP, MARION COUNTY, INDIANA;
THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION COUNTY, INDIANA;
THE METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA;
SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA;
SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA;
THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY;
THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS;
THE INDIANA STATE BOARD OF EDUCATION a public corporate body;

Added Defendants,

CITIZENS FOR QUALITY SCHOOLS, INC.;
COALITION FOR INTEGRATED EDUCATION;

Amicus Curiae.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA,
Cross-Claimants,
-vs-
THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY,
THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS,
Cross-Defendants.

ENTRY

This case comes before the court once again, this time on the order of the Court of Appeals directing this court to give further consideration to its order of April 7, 1978 denying approval of a skeleton desegregation plan proposed by the defendant Board of School Commissioners of the City of Indianapolis (IPS), and intended by it to be implemented for the 1978-79 school year. The plan is referred to by the Court of Appeals as the Proposed Intradistrict Plan, and will hereafter be so styled herein by its initials (PIP).

The Court of Appeals has posed certain questions to this court, which will be answered *seriatim*. However, it also requests that a determination as to the merits of IPI be made independently of the matter of an interdistrict remedy. With all due respect, this court is simply unable to consider one without the other for the very simple reason that the Court of Appeals has already adopted this court's previous findings, based on the evidence, that an interdistrict remedy is the only practical way to desegregate IPS with any prospect of long term success. A

recent pronouncement of the Court of Appeals adopting this finding as the law of the case, and criticizing the United States for doing the very thing it is doing in this rather precipitous appeal is as follows:

> "The Government contends that the mandatory transfer of students between IPS and the suburban schools ordered by the district court is improper. After conceding the import of *Milliken*, the propriety of interdistrict relief, and noting the specific finding of facts found by the district court to have substantially caused segregation in the other districts, the Government concludes the district court's order was an abuse of discretion. We are confused by the Government's reasoning.
>
> "We fail to see how the district court abused its discretion when it was clearly acting within the guidelines of *Milliken*. It was not an abuse of discretion merely because the Government would have preferred another remedy.
>
> "Furthermore, the Government's arguments are inconsistent. On the one hand, it demands that segregation be eliminated root and branch from within IPS; on the other, it condemns the only relief which can make its demand a reality. We are surprised the Government seriously offers voluntary transfer as an alternative to mandatory transfer as an alternative to mandatory transfer as a means to effectuate its goal of complete desegregation. History has taught us that 'freedom of choice' plans produce negligible results. *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1967)." *United States v. Board*, 541 F.2d 1211, 1223.

Further, this court believes that the interdistrict remedy previously ordered by it can and should be put into effect at once, wholly apart from the consideration posed by such cases as *Village of Arlington Heights v. Metropolitan*

Housing Development Corp., 429 U.S. 252 (1977), and *Washington v. Davis*, 426 U.S. 229 (1976). These cases, requiring a finding of a racially discriminatory intent as a prerequisite to the granting of equitable relief, deal purely and simply with the limits on the power inherent in a federal court of equity to rectify problems arising as a result of segregation.

As a matter of constitutional law, then, the Court of Appeals has held, following the mandate of the Supreme Court, the *Arlington Heights* and *Washington v. Davis* must be considered by this court. This court will do so and will express its findings in a very short time. *Meanwhile, however, it is respectfully submitted that the State of Indiana has provided a remedy which this court has followed, but which has heretofore never been considered by the Court of Appeals because no appellant added defendant school corporation has raised or challenged the point.*

In its Supplemental Memorandum of Decision dated December 6, 1973, 368 F.Supp. 1191 beginning at 1223, this court recognized both the right and the duty of the General Assembly of Indiana to legislate with a view toward assisting in the process of desegregation. Various possible approaches were pointed out, but with no suggestion as to which would be preferable; indeed, the General Assembly was encouraged to come up with a workable solution of its own.

Shortly thereafter, during its 1974 session, the General Assembly acted promptly upon this court's suggestion, and adopted a method by which any state or federal court in Indiana could order transfers of students from segregated school corporations to other school corporations, and provided a workable method of reimbursement to the transferee corporations. This Act was written, passed, and in force under an emergency clause on February 20, 1974 — only 76 days after it was suggested by this court as one possible means of meeting the problem! I.C. 1971, 20-8.1-

6.5-1, *et seq.* The Act provides that three essential elements be met in order for the transfers to take place, as follows:

(1) A transferor corporation must have violated the equal protection clause of the fourteenth amendment to the Constitution of the United States by practicing *de jure* racial segregation of the students within its borders;

(2) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of the transferor school corporation; and

(3) The fourteenth amendment compels the court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment.

The foregoing constitute all of the requirements for transfer (save exhaustion of appeals). There is no requirement whatever for *Arlington Heights* or *Washington v. Davis* analysis of the transferee corporation, nor that it have been guilty of any fourteenth amendment violation. The statute represents purely and simply a State enacted remedial measure, which the General Assembly had undoubted power to enact.

At the time the Indiana Transfer Act (ITA) was passed, this case was on appeal, and continued in this status until April 21, 1975, on which date the Supreme Court denied certiorari as to the decision of the Court of Appeals dated August 21, 1974, 503 F.2d 68. That decision directed this court to have a further hearing to determine whether, under the guidelines of *Milliken v. Bradley*, 418 U.S. 717 (1974), a case decided by the Supreme Court while the Indianapolis case was on appeal, an interdistrict remedy was justified within the area of Uni-Gov. Such a hearing was held, and the question answered in the affirmative on

August 1, 1975 (Indianapolis IV), 419 F.Supp. 180. That decision was affirmed by the Court of Appeals on July 16, 1976, 541 F.2d 1211, but the latter decision was vacated and remanded by the Supreme Court on January 25, 1977, 429 U.S. 252. The Court of Appeals then vacated and remanded the decision of this court on February 14, 1978 (mandate received March 31, 1978). The latter decision is as yet unreported.

In its opinion of August 1, 1975, this court specifically stated that in addition to the *Milliken* question it would also consider matters of Indiana law, thus:

> "This Court was specifically directed to determine whether the establishment of the Uni-Gov boundaries of the City of Indianapolis without a like re-establishment of Indianapolis Public Schools boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). Pursuant to such direction, a further evidentiary hearing was held, beginning March 18, 1975, and the parties have submitted both oral argument and briefs, all of which have been considered. The Court has also given consideration to other matters raised by the pleadings and evidence, and to matters of Indiana law, all as will more fully appear." 419 F.Supp. 180, at 182.

After answering the *Milliken* question in the affirmative, this court then immediately launched into a discussion of the ITA, pointed out its essential elements as previously set out in this opinion, and then set out its findings as follows:

> "In the case at hand, we have a suit in which all of the school corporations in Marion County, Indiana are parties, and in which this Court has made, and now reiterates, the following findings:
>
> (a) The defendant Board of School Commissioners of Indianapolis, Indiana (IPS) has violated the equal

protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing *de jure* racial segregation of the students within its borders. *United States v. Board of Sch. Com'rs, Indianapolis, Ind.*, 332 F.Supp. 655 (S.D.Ind. 1971), aff'd 474 F.2d 81 (7 Cir.), cert.den. 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041 (1973).

(b) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of IPS. 'In the long haul, it won't work.' 332 F.Supp. at 678.

"This Court found as a fact in its opinion of July 20, 1973, 368 F.Supp. 1191, et seq., that within the IPS boundaries resegregation of desegregated schools occurs when the percentage of black students in a given school approaches 25% to 30%, more or less. That finding has not been challenged by anyone. Therefore, in a school corporation in which the precentage of black pupils has now reached more than 42% over all, and with the Court of Appeals having ordered this Court to take further steps to desegregate the same, 503 F.2d 80, the Court is placed in an impossible situation unless the transfer for education of a substantial number of black IPS pupils to school corporations other than IPS is accomplished.

"The Court therefore makes the following additional finding:

(c) The Fourteenth Amendment compels the Court to order IPS to transfer a substantial number of its black students to various added defendant school corporations for education in order to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment." 419 F.Supp. 180, 184.

This court then ordered that a certain number of black students be transferred from IPS to various other school

corporations within the Uni-Gov area. In a separate order of the same date, exact numbers of students were assigned to each transferee school. IPS was ordered to identify the transfer pupils and then to submit to this court a final plan for desegration of the remaining students within IPS. 419 F.Supp. 186. (IPS has not complied with this order in any particular; indeed, it specifically directed its Director of Planning to disregard it and to work up the PIP plan when he brought such order to the attention of the present Board. Testimony of witness Payne, May 30, 1978.)

In making the explicit findings compatible with ITA, as above set out, this court was obviously acting pursuant to the terms of that act. Not one of the transferee corporations named in the accompanying orders of the court challenged these findings on appeal. Rather, they raised the false issue that there was insufficient evidence to support the *Milliken* findings. This very clever maneuver on the part of such added defendants has been successful to date, since the Buckley plaintiffs have sought only to meet the errors asserted by added defendants (and the original plaintiff), and have wholly failed to point out to the Court of Appeals that the remedy provided by the State of Indiana makes it unnecessary to consider the constitutional issues which would otherwise require solution. However, the time in which a transferee corporation could have questioned this court's findings has long since passed, so there would appear to be no reason why this court's orders, based on ITA, should not be carried out.

Long established practice holds that questions of constitutionality are not to be decided unless such adjudication is unavoidable. *Kelly v. Illinois Bell Telephone Company*, 325 F.2d 148 (7 Cir. 1963). Although application of ITA requires constitutional determinations to be made by the trial court, such have in this case been made long ago and have either been affirmed on appeal or not raised on appeal. They are now *res judicata*, and ITA may and should be applied.

This court was ordered to consider the merits of the PIP plan. Of ocurse, it had already done so insofar as could be done in view of the incompleteness of the submission, when it denied permission to implement the plan on April 7, 1978, after hearing the arguments of counsel on April 6, 1978. However, in order to supplement the record, and to develop facts required to meet the questions posed by the Court of Appeals, a further hearing was had on May 30-31, 1978. The United States offered no evidence, but evidence was presented by IPS, the Buckley intervening plaintiffs, and by intervening plaintiff Indiana State Teachers Association. From the evidence heard the court finds as follows:

(A) PIP is not sound (apart from any interdependence with an interdistrict remedy) as a remedy to be put into effect in 1978-79, because:

(1) It is not complete in that Phase III (the plan for the elementary schools) has not even been begun except for the two-page skeleton filed May 26, 1978 at 4:13 p.m. Even the skeleton had not been adopted at the time it was filed, and was not adopted until some sort of a hurry-up meeting was held on Memorial Day, May 29.

(2) It cannnot be implemented as to Phase II (upper elementary) because Phase II (the details of which were only filed on May 26, 1978 at 4:13) depends upon the use of two buildings which are not even in existence, and which will not be completed for a matter of years. Most of the other proposed upper elementary schools require remodeling or additions which will require until January, 1979 to complete.

(3) It should not be implemented as to Phase I (high schools), as it is unnecessarily complicated and substantially destroys the stability of presently stable elementary schools.

(a) There are only two high schools which are substantially out of phase which the Board's own guidelines. Both schools have an unduly high black population, but this has come about since the filing of this action as a matter of demographic movement. It is not necessary to reorganize the high school patterns in the whole city to change the racial balance in two schools.

(b) The PIP plan provides that elementary students may only attend schools located in their ultimate high school attendance areas, so that many present elementary attendance areas will be split.

(4) PIP has been discussed either minimally, or not at all, with IPS teachers, with the exception of the options aspect. A new plan of massive reassignments which has not been explained to the teachers will not function well, it at all.

(5) The main selling point of the PIP plan was the options plan for the elementary schools. Only 20% of the elementary children, or their parents, made a choice under the options plan. As a result IPS has *voluntarily* abandoned the options plan, except for a few pilot schools.

(6) While IPS was attempting to sell its options plan to parents, teachers, pupils, and the public, it gave no general publicity to the fact that PIP in its entirety was in reality a massive desegregation plan.

(a) Consequently, the public, parents, teachers, and pupils are unprepared for PIP.

(b) The above facts will hinder or defeat the success of PIP, according to IPS's own witnesses.

(7) IPS to this date has not furnished the court with any estimate as to the number of students who will be dislocated and reassigned from the present schools under PIP.

(8) PIP represents a "massive 'fruit basket' scrambling of students..." which both this court, 332 F.Supp. 655, 678,

and the Court of Appeals have said "'won't work' in the long run." Moreover, all witnesses who testified on this point at the hearing of May 30-31, including the defendant Superintendent of Schools of IPS, agreed with this statement.

(B) The representation that PIP cannot be implemented for 1978-79 unless it be approved at about the present time is incorrect.

(1) It could not be implemented for 1978-79 even if it was approved at this time, because:

(a) The options plan has already been abandoned for lack of interest.

(b) The Phase II buildings cannot be built or altered in time.

(C) If PIP were presently approved and implemented for 1978-79, and at some later time an interdistrict remedy were found appropriate, (answering the precise question put, although an interdistrict remedy is already appropriate under ITA) the implementation of PIP might well interfere with, and in fact prevent entirely the formulation and implementation of interdistrict remedy.

Of the many Supreme Court cases on desegregation, probably the most quoted case after *Brown I*, and certainly the easiest to understand, is *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, (1971). The last two paragraphs of the text in that decision read as follows:

"At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in Brown I. The systems would then be 'unitary' in the sense required by our decisions in Green and Alexander.

It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school

> authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." 402 U.S.1, 31.

As stated above, the United States presented no evidence at the current hearing. However, its counsel made an opening statement in which he said, or said in substance, the following:

(1) IPS schools can be desegregated with the IPS only PIP plan.

(2) By desegregated is meant that "... if you take all these schools and make them 60-40 or something like that, then theoretically you have fulfilled the constitutional mandate."

(3) The Government will not predict and is not concerned with what will happen after a massive racial balancing plan is put into effect, so long as it is theoretically sound on paper from the standpoint of numbers.

(4) The Attorney General is opposed to any plan which would involve suburban schools.

It seems obvious to this court that if PIP is ordered implemented by the Court of Appeals, the United States will immediately declare IPS desegregated and get out. Indeed, under *Swann* it will be argued by added defendant transferee corporations and perhaps by the Attorney

General as well that the case must forthwith end, except for monitoring. The Buckley plaintiffs, representing all black school children in IPS do not want this result, the trial court does not want this result, and the Court of Appeals did not appear to want it when it spoke as set out on pages 1 and 2 of this opinion.

(D) The explanation for it being termed "counterproductive" to put the PIP into effect for the year 1978-79 (or any year) is:

(1) It is unsound, as explained in (A).

(2) It might well block further considertion of any interdistrict remedy, as explained in (C). It is submitted that, contrary to the tentative opinion of the Court of Appeals appearing at thte top of page 6 of its May 17 order, such would produce probable injustice.

One other matter remains, as to matters on appeal, and that is the matter of the reassignment of students presently attending the Harry E. Wood High School. This court originally denied the proposed method of reassignment on no very good basis except that it appeared to be a part of a wholly unsound package (PIP). The court now reverses itself and approves the proposd Wood plan, if it has jurisdiction to do so; if it does not have such jurisdiction, it respectfully suggests that the Court of Appeals order such plan approved.

The court detects a note of urgency in the May 17, order, which is not inappropriate in view of the length of time this case has been in the courts. However, this is no routine case, and in the end should result in implementation of the innovative plan designed by the General Assembly of Indiana, which might well serve as a guide to other troubled school districts.

It is not as if nothing were being done in Indianapolis to relieve segregation. Approximately 9,500 students have been bused daily since 1973 without serious incident; all

high schools meet or approach PIP guidelines save two; there are no longer any all white schools at any grade level. The only remaining problem of substance is the several 90% or more black elementary schools, and this problem will be alleviated by application of ITA and relatively minor readjustments thereafter.

ORDER

Having answered all questions put to it by the Court of Appeals, this court now returns to old business. If IPS can draw up a completely new, city wide, Phase III elementary school plan where none at all now exists, and do it in eight weeks (which is testimony about which this court has some reservation), it can surely designate the pupils for transfer to transferee school corporations, and adjust the remaining IPS students even more quickly. It was ordered to make such plans in 1975, and has not done so. The reason is clear- the IPS superintendent testified that IPS did not want to give up any students or close any schools. This may be a reason, but it is not an acceptable excuse.

It is therefore considered and ordered that the defendant Board of School Commissioners forthwith proceed to formulate a plan for the transfer of black students to the various transferee school corporations, in the same numbers and grade levels, all as set out in this court's judgment dated August 1, 1975. IPS may consult with the transferee schools, but will be sole judge as to what students will be transferred, and will not delay its plans for purposes of consultation. Such plan should be completed within six weeks from this date, or sooner if possible.

Further orders will be made regarding the implementation of such plan pursuant to ITA at the same time that this court announces its findings and conclusions as required by the Court of Appeals in its remand of February 14, 1978. It is anticipated that the same will be

forthcoming in three weeks, more or less, but said planning should begin on receipt of this order.

All of which is considered and ordered this 2nd day of June, 1978.

/s/ S. Hugh Dillin

Judge, United States
District Court

Copies to:

Lewis C. Bose
1100 First Federal Building
Indianapolis, Indiana 46204

Richard L. Brown
156 East Market Street

Indianapolis, Indiana 46204

James B. Burroughs
2560 City-County Building
Indianapolis, Indiana 46204

Richard J. Darko
Suite 2410
One Indiana Square
Indianapolis, Indiana 46204

Charles W. Hunter
810 King Cole Building
Indianapolis, Indiana 46204

Harold E. Hutson
1322 Circle Tower
Indianapolis, Indiana 46204

Charles D. Kelso
3200 Fifth Avenue
Sacramento, California 95817

William E. Marsh
735 West New York Street
Indianapolis, Indiana 46202

Virginia Dill McCarty
United States Attorney
274 United States Courthouse
Indianapolis, Indiana 46204

John O. Moss
Suite 902
156 East Market Street
Indianapolis, Indiana 46204

Theodore L. Sendak
Attorney General
219 State House
Indianapolis, Indiana 46204

Alexander Ross
Michael Sussman
Civil Rights Division
Department of Justice
Washington, D.C. 20530

Donald A. Schabel
Suite 3300
One Indiana Square
Indianapolis, Indiana 46204

William O. Schreckengast
380 Main Street
Beech Grove, Indiana 46107

John Preston Ward
Apartment 5
2951 North Capitol Avenue
Indianapolis, Indiana 42608

John Wood
500 Union Federal Building
Indianapolis, Indiana 46204

William L. Taylor
Center for National Policy
Rev.
Washington, D.C. 20064

TRANSFER STATUTE

20-8.1-6.5-1 [28-5031]. Court ordered transfers — Application of law — Limitations. — This chapter [20-8.1-6.5-1—20-8.1-6.5-10] concerns the transfer of students for education from one school corporation (transferor corporation) to another school corporation (transferee corporation) in compliance with a court order as described in this section. This chapter applies solely in a situation where a court of the United States or of the state of Indiana in a suit to which the transferor or transferee corporation or corporations are parties has found the following: (a) a transferor corporation has violated the equal protection clause of the fourteenth amendment to the Constitution of the United States by practicing *de jure* racial segregation of the students within its borders' (b) a unitary school system within the meaning of such amendment cannot be implemented within the boundaries of the transferor corporation; and (c) the fourteenth amendment compels the court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment. This chapter shall not apply until all appeals from such order, whether taken by the transferor corporation, any transferee corporation or any party to the action, have been exhausted or the time for taking such appeals has expired, except where all stays of a transfer order pending appeal or further court action have been denied. [IC 1971, 20-8.1-6.5-1, as added by Acts 1974, P. L. 94, § 1, p. 345.]

20-8.1-6.5-2 [28-5032]. Definitions. — As used in this chapter [20-8.1-6.5-1—20-8.1-6.5-10]:

(a) "Transferor corporation," "transferee corporation" and "transferred student" shall mean, respectively, the school corporation transferring students, the school corporation receiving students, and any student transferred pursuant to a court order described in section 1 [20-8.1-6.5-1] of this chapter.

(b) "General fund," "cumulative building fund" and "debt service fund" shall refer, respectively, to the school corporation funds set up under the provisions of IC 1971, 21-2-11 [21-2-11-1—21-2-11-8], 21-2-6 [21-2-6-1—21-2-6-3] and 21-2-4 [21-2-4-1—21-2-4-6], respectively.

(c) "Class of school" shall refer to a classification of each school in the transferee corporation by the grades taught therein (generally denominated as elementary schools, middle schools or junior high schools, high schools, and special schools such as schools for special education, vocational training or career education). Elementary schools shall include schools containing kindergarten, but for all purposes under this chapter, a kindergarten student shall be counted as 1/2 student.

(d) "ADM" shall refer to ADM as defined in IC 1971, 21-3-1.5 [21-3-1.5-1—21-3-1.5-5]. [IC 1971, 2[illegible]8.1-6.5-2, as added by Acts 1974, P. L. 94, § 1, p.345.]

20-8.1-6.5-3 [28-5033]. Transfer tuition — Computation and payment — Payment of book rental. — (a) The transferee corporation shall be entitled to receive from the transferor corporation transfer tuition for each transferred student for each school year calculated in two [2] parts: operating cost and capital costs. These shall be allocated on a per student basis separately for each class of school.

(b) The operating cost for each class of school shall be based on the total expenditures of the transferee corporation for such class from its general fund expenditures as set out on the classified budget forms

prescribed by the state board of accounts, excluding from such calculation capital outlay, debt service, costs of transportation, salaries of board members, contracted service for legal expenses and any expenditure which is made out of the general fund from extracurricular account receipts, for the school year.

(c) The capital cost for each class of school shall consist of the lesser of the following two [2] alternatives: Alternative one [1] shall be based on an amount equal to five per cent [5%] of the cost of transferee corporation's physical plant, equipment and all appurtenances thereto (including but not limited to buildings, additions and remodeling thereof, except ordinary maintenance, on-site and off-site improvements such as walks, sewers, waterlines, drives and playgrounds) theretofore paid or obligated to be paid in the future out of the general fund, cumulative building fund or debt service fund, including but not limited to principal and interest and lease rental payments (or out of funds which were legal predecessors to these funds). Where any item of physical plant, equipment appurtenances, or portion thereof is more than twenty [20] years old at the beginning of the school year, the capital cost thereof shall be disregarded in making such computation. Alternate two [2] shall be based on the amount budgeted from the general fund for capital outlay for physical plant, equipment and appurtenances and the amounts levied for the debt service fund and the cummulative building fund, for the calendar year in which the school year ends.

(d) Where an item of expense or cost cannot be allocated to a class of school, it shall be prorated to all classes of schools on the basis of the ADM of each class in the transferee corporation compared to the total ADM therein.

(e) The transfer tuition for each student transferred for each school year shall be calculated by dividing the transferee school corporation's total operating costs and the total capital costs for the class of school in which the student

is enrolled by the ADM of students therein. Where a transferred student is enrolled in a transferee corporation for less than the full school year the transfer tuition shall be calculated by the proportion of such school year for which the transferred student is enrolled. A school year for this purpose shall consist of the number of days school is in session for pupil attendance. A student shall be enrolled in a transferee school, whether or not he is in attendance, unless his residence is outside the area of students transferred to the transferee corporation, or he has been excluded or expelled from school or has been confirmed as a school dropout. The transferor and transferee corporations may enter into written agreements concerning the amount of transfer tuition. Where an agreement cannot be reached the amount shall be determined by the superintendent of public instruction, with costs to be established, where in dispute, by the state board of accounts.

(f) The transferor corporation shall also pay the transferee corporation, when billed, the amount of book rental due from transferred students who are unable tc pay the amount thereof. The transferor corporation shall be entitled to collect the amount of such book rental from the apropriate township trustee, from its own funds, or from any other source, in the amounts and manner provided by applicable law. [IC 1971, 20-8.1-6.5-3, as added by Acts 1974, P. L. 94, § 1, p. 345.

20-8.1-6.5-4 [28-5034]. Emergency funds for transfer [effective January 1, 1980]. — Where a transfer is ordered to commence in a school year, where the transferor corporation has net additional costs over savings (on account of any transfer ordered) allocable to the calendar year in which the school year begins, and where the transferee corporation has no budgeted funds for such net additional costs, they may be recovered by one or more of the following methods in addition to any other methods provided by applicable law.

(1) An emergency loan made pursuant to IC 20-5-4-6 to be paid, however out of the debt service levy and fund, or a loan from any state fund made available therefor,

(2) An advance in such calendar year of state funds, which would otherwise become payable to the transferee corporation after such calendar year pursuant to applicable law, and

(3) A grant or grants in such calendar year from any funds of the state made available therefor.

The net additional costs shall be certified by the state board of tax commissioners, and any grant shall be made solely after affirmative recommendation of the tax control board created by IC 6-1.1-19-4. Repayment of any advance or loan from the state shall be made in accordance with IC 6-1.1-19-4(e)(1)(cc). The use of any of the methods enumerated above shall not subject the transferor corporation to the provisions of IC 6-1.1-19-4(e)(2). [IC 20-8.1-6.5-4, as added by Acts 1974, P.L. 94, § 1, 1979, P.L. 208, § 3.]

20-8.1-6.5-5 [28-5035]. Transfer tuition — Time of payment. — Transfer tuition for each school year shall be paid by the transferor corporation during the term of the year and following the end thereof in four [4] instalments within ten [10] days of the first day of November, February, May and August, respectively. The first three [3] payments shall be calculated on the basis of estimates based on the previous year's cost per student and the enrollment for the day schools are open in the transferee corporation next preceding the applicable payment date. [IC 1971, 20-8.1-6.5-5, as added by Acts 1974, P. L. 94, § 1, p. 345.]

20-8.1-6.5-6 [28-5036]. Charging and crediting tuition payments to funds. — Payment of operating cost shall be paid from and receipted to the respective general funds of the transferor and transferee corporations. Payment of capital costs shall be made by the transferor corporation at

its discretion from any fund or source and shall be receipted by the transferee corporation at its discretion either to the cumulative building fund or to the debt service funds. [IC 1971, 20-8.1-6.5-6, as added by Acts 1974, P.L. 94, § 1, p. 345.]

20-8.1-6.5-7 [28-5037]. Transportation provided — Exception. — The transferor corporation shall provide each transferred student transportation to and from the school in the transferee corporation to which he is assigned but may require the transferred student to walk a reasonable distance from his home to school or to a transportation pick-up point. [IC 1971, 20-8.1-6.5-7, as added by Acts 1974, P. L. 94, § 1, p. 345.]

20-8.1-6.5-8 [28-5038]. Transportation by transferor — Contracting with transferee authorized. — Transportation shall be provided by the transferor corporation to each transferred student in accordance with the provisions of IC 1971, 20-9.1 [20-9.1-1-1—20-9.1-7-4], except that the transferor corporation may contract with the transferee corporation to provide transportation to the transferred students (the transferor corporation paying the costs thereof) and that the transferor corporation, in addition to the other means of financing the purchase of transportation equipment, may make such purchases out of its cumulative building fund. [IC 1971, 20-8.1-6.5-8, as added by Acts 1974, P. L. 94, § 1, p. 345.]

20-8.1-6.5-9 [28-5039]. Transportation costs — State reimbursement — Tax levy. — Transportation costs for transferred students for each calendar year or for capital outlay and for operations shall be reimbursed by the state to the transferor corporation in the same per cent of the total outlay which the distributions to the transferor corporation under IC 1971, 21-3-1.5-3, or from the state flat grant distribution account where it is credited to the general fund, constitute of its total annual general fund appropriations for such year. In this calculation there shall

be excluded from general fund appropriations capital outlay, debt service, and any expenditure which is made out of the general fund from extracurricular accounts. Any amount not thus reimbursed and raised as part of the transferor corporation's general fund levy shall constitute an increase in its base tax levy for such budget year, as otherwise defined and as applied in IC 1971, 6-1-67 [6-1-67-1—6-1-67-8]. In no event shall the state reimbursement for transportation operating expense to the transferor corporation be less than it would receive under applicable lay without regard to this section. [IC 1971, 20-8.1-6.5-9, as added by Acts 1974, P. L. 94, § 1, p. 345.]

20-8.1-6.5-10 [28-5040]. Administration and enforcement of law - Rules and regulations — Disputes. — The provisions of this chapter [20-8.1-6.5-1—20-8.1-6.5-10] concerning the calculation of transfer tuition, the credits for state distribution, state reimbursement of transportation costs, or other state reimbursement may be implemented by regulation of the general commission of the state board of education which shall also adopt rules for the enforcement of the payment of transfer tuition. Such enforcement may include, but is not limited to, the withholding of state support from the transferor corporation for the benefit of the transferee corporation. Any dispute in the amount of transfer tuition or state reimbursement shall be determined, upon application of either the transferor or the transferee corporation, by the state superintendent of public instruction. [IC 1971, 20-8.1-6.5-10, as added by Acts 1974, P. L. 94, § 1, p. 345.]

Office - Supreme Court, U.S.
FILED
OCT 18 1982
STEVAS,
CLERK

No. 82-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. ORR, AS GOVERNOR OF THE STATE OF INDIANA, *et al.*,
Petitioners,
v.
THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF RESPONDENT BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS IN OPPOSITION

JOHN WOOD
BAMBERGER AND FEIBLEMAN
500 Union Federal Building
Indianapolis, Indiana 46204
317/639-5151

WILLIAM L. TAYLOR
CENTER FOR NATIONAL POLICY REVIEW
Catholic University Law School
Washington, D.C. 20064
202/832-8525

Attorneys for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the district court and the court of appeals abused their discretion in placing on the State of Indiana the responsibility for financing the remedy for a constitutional violation involving racial segregation among public school districts in Indiana where the constitutional violation was committed solely by the State and not by any of the affected school districts.

2. Whether the district court and court of appeals erred in holding that a state statute apportioning the costs of interdistrict court-ordered transfers among the State and its school districts did not apply to a situation in which the State had been adjudicated the sole violator and, in any event, could not serve to limit the State's liability for its own constitutional violations.

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:	Page
Columbus Board of Education v. *Penick*, 443 U.S. 449 (1979)	4, 5
Liddell v. *Board of Education of St. Louis*, 667 F.2d 643 (8th Cir. 1981), *cert. denied*, 102 S.Ct. 634 (1981)	5
Milliken v. *Bradley*, 433 U.S. 267 (1977)	3, 4, 5, 7, 8
Milliken v. *Bradley*, 418 U.S. 717 (1974)	2
Penick v. *Columbus Board of Education*, 519 F. Supp. 925 (S.D. Ohio 1981), *aff'd*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 102 S.Ct. 1713 (1982)	5
Reed v. *Rhodes*, 500 F. Supp. 404 (N.D. Ohio 1980), *aff'd*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 102 S.Ct. 1713 (1982)	5
United States v. *Board of School Comm.* (7th Cir. 1980), 637 F.2d 1101, *aff'g*, 506 F. Supp. 657 (S.D. Ind. 1979), *cert. denied*, 449 U.S. 838 (1980)	3, 6, 8, 9
United States v. *Board of School Comm.* (7th Cir. 1974), 503 F.2d 68, *rev'g*, 368 F. Supp. 1191 (S.D. Ind. 1973), *cert. denied*, 421 U.S. 929 (1975)	2
United States v. *Board of School Comm.* (S.D. Ind. 1978), 456 F. Supp. 183	3
Washington, et al. v. *Seattle School District No. 1, et al.*, —— U.S. ——, 50 U.S.L.W. 4998 (June 30, 1982)	6

Constitutional and Statutory Provisions:	
I.C. 20-8.1-6.5-1 *et seq.* (Transfer Statute)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-479

ROBERT D. ORR, AS GOVERNOR OF THE STATE OF INDIANA, *et al.*,
Petitioners,

v.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF RESPONDENT BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' principal contention is that in taxing to them the full costs of remedying the constitutional violation found in this case, the courts below erred by failing to give effect to a state statute which prescribed an alternative means for allocating such costs. The inapplicability and irrelevance of the state statute—the Indiana Transfer Act—is demonstrated not only by its text, but by surrounding legal and historical circumstances that are omitted from petitioners' statement of the case.

Petitioners are correct in asserting (p. 3) that the Indiana Transfer Statute was enacted in 1974 "at the

behest of the district court in its 1973 opinion, 368 F.Supp. at 1224-1227." But this 1973 opinion calling for interdistrict transfers and the transfer statute itself were based on a theory of liability long since discarded in this case. The decision held that transfers were required by constitutional violations committed solely within the Indianapolis school district (IPS) for which the State was jointly responsible, and were necessary to provide an effective remedy for resulting segregative conditions in IPS schools. 368 F.Supp. 1191, 1197-1208. The court expressly found it unnecessary to rule on the constitutionality of those provisions of state legislation (Uni-Gov) which froze the boundaries of IPS and surrounding school districts while expanding other governmental functions of the city to the county line. 368 F.Supp. at 1208.

The district court's 1973 decision was reversed by the court of appeals following this Court's decision in *Milliken* v. *Bradley*, 418 U.S. 717 (1974) (*Milliken I*), holding that an interdistrict school desegregation remedy could be imposed by a federal court only upon a finding that a constitutional violation within a single school district had interdistrict effects, or that a separate interdistrict violation was committed by the state or other governmental entities. The court of appeals directed the district court to determine the constitutionality of the Uni-Gov legislation in its relation to school boundaries. 503 F.2d 68, 86 (1974), *cert. denied*, 421 U.S. 929 (1975). This Court's *Milliken I* decision and the 1974 decision of the court of appeals in this case were rendered subsequent to the passage of the Indiana Transfer Act, which responded to the district court's 1973 decision.

The ultimate basis for requiring an interdistrict remedy was a finding of a constitutional violation wholly distinct from that contained in the 1973 opinion and posited in the Transfer Act. The district court found that the State had committed an interdistrict constitutional violation in establishing new civil city boundaries

without a like reestablishment of IPS boundaries, and that the Housing Authority of the City of Indianapolis, a state-created agency having no connection with school governments, likewise committed an interdistrict constitutional violation by locating new public housing projects solely within IPS boundaries. 456 F.Supp. 183, 188-189. The interdistrict remedy was supported by the district court on the basis of those interdistrict violations, 506 F.Supp. 657, 663-665, and affirmed by the court of appeals primarily in reliance on the Uni-Gov violation. 637 F.2d 1101, 1113-1114. Rejecting assertions made by IPS, the district court expressly found that the intra-IPS constitutional violations had no interdistrict effect, 506 F. Supp. 657-667, *aff'd*, 637 F.2d 1101, 1112.

As part of its remedial order, the district court ordered the State to design, cause to be implemented in the transferee districts, and pay all costs not otherwise funded of a comprehensive program of in-service training and other ancillary relief. 506 F.Supp. 657, 671-674, 678. The court of appeals affirmed that portion of the judgment on authority of *Milliken* v. *Bradley*, 433 U.S. 267 (1977) (*Milliken II*). 637 F.2d at 1116.

Contrary to the statement of petitioners (p. 3), the court of appeals specifically rejected the Transfer Act as a basis for liability, stating that "[i]t is not an independent source of authority to require student transfers and cannot, standing alone, be the basis for a desegregation order." 637 F.2d at 1112.

This Court denied certiorari on petitions by the State, suburban school corporations and IPS. 449 U.S. 838 (1980).

SUMMARY OF ARGUMENT

The remedial order of the district court, imposing on the State of Indiana the responsibility for financing the interdistrict student transfers in this case, simply applied

to the facts of the constitutional violation previously adjudicated the well-settled principle of school desegregation remedies that "the remedy imposed by a court of equity should be commensurate with the violation ascertained." *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 465 (1979). Since the State was the constitutional wrongdoer in the interdistrict phase of the case, the court of appeals correctly applied that basic principle in affirming the district court's order. The Indiana Transfer Act did not require the courts below to reach a different result since it was not facially applicable to situations in which the State was the principal or sole wrongdoer.

Even if the Transfer Act had been intended to limit the scope of the State's remedial obligations where the State itself was found to be the constitutional wrongdoer, the statute could not be used by the State to diminish responsibility for correcting its own wrongs. The Tenth Amendment provides no shield for a state against a federal court order which simply holds the State legally responsible to remedy its own violations of the Fourteenth Amendment. *Milliken* v. *Bradley*, 433 U.S. 267, 291 (1977). Nor did the courts below exceed their remedial authority in ordering the State to finance the obligations imposed by the order from funds not otherwise appropriated. This step, necessary in this case to prevent the State from reapportioning costs to the detriment of local school districts and black students, was expressly approved by this Court in *Milliken II*, 433 U.S. at 295 (Powell, J., concurring).

Finally, petitioners may not reduce their liability by belatedly pointing to inequities in the underlying remedial decree which has been finally approved and long since implemented. This is particularly the case where petitioners themselves have authority to redress the perceived inequities through a restructuring of local governance arrangements.

ARGUMENT

1. The decisions below were a correct and routine application of the basic principle that the remedy imposed by a court of equity should be commensurate with the violation and that a wrongdoer is liable for the cost of rectifying his wrongful conduct. *Milliken* v. *Bradley*, 433 U.S. 267 (1977) (*Milliken II*); *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 465 (1979); *Liddell* v. *Board of Education of St. Louis*, 667 F.2d 643 (8th Cir. 1981), *cert. denied*, 102 S.Ct. 634 (1981); *Reed* v. *Rhodes*, 500 F.Supp. 404, 425-426 (N.D. Ohio 1980), *aff'd*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 102 S.Ct. 1713 (1982); *Penick* v. *Columbus Board of Education*, 519 F.Supp. 925, 942 (S.D. Ohio 1981), *aff'd*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 102 S.Ct. 1713 (1982).

The only difference is that in the above-cited lower court cases, the wrong was of an intradistrict character and local districts shared with the state responsibility for the constitutional violation, whereas here the State was solely responsible for the interdistrict violation and thus was assessed the full cost of remedy. The principle, however, is precisely the same.

Petitioners seek to escape this principle, the application of which is not in conflict among the circuits, by reliance on a state statute which allocates costs of interdistrict desegregation transfers to local school districts.[1] But that statute on its face applies in situations where interdis-

---

[1] The Transfer Act requires the transferor school corporation to pay the receiving corporation transfer tuition and specifies the mechanics for computing payments. Sections 3, 5 and 6. Petitioners erroneously imply (p. 4 n.3) that the statute obligates the State to fund part of the educational costs of interdistrict transfers. In fact, the cited provisions apply only to a temporary transition period and no State funds have been appropriated under these provisions. The transferor corporation is also made responsible for providing or securing transportation for the transferred students. Sections 7, 8.

trict transfers grow out of constitutional violations by a local school corporation.[2] That is not the case here where the interdistrict remedy has been predicated entirely on constitutional violations by the State and its housing agency. 506 F.Supp. 657; 637 F.2d 1101, 1113-1114.

Petitioners also seek (pp. 11-13) to bring the Indiana Transfer Act back into play by arguing that the courts below were obligated to look behind the findings of State violation and to determine that the violations were induced by actions of public officials in suburban Marion County. They cite no authority (and indeed there is none) except the dissenting opinion below for this novel theory, which would introduce enormous complexity into determinations of State responsibility for its legislative acts. Even assuming there were some merit to the State's point, the result of applying the Transfer Act here would be to affix responsibility for costs on the transferor corporation (IPS), which all parties concede is not liable for the interdistrict violation, and to continue to hold harmless the suburban transferee districts which the State urges induced the violation.[3]

---

[2] As noted, *supra*, p. 2, the statute was enacted in response to a theory of liability long since discarded in this case. Section 1 (Pet. App. at A-66).

[3] Petitioners' further suggestion (p. 10) that none of the school districts has standing to question the applicability of the State Transfer Act is not a serious argument. IPS and all of the suburban districts have been parties throughout the interdistrict case for purposes of determining both liability and remedial obligations. Just as districts in *Milliken, Liddell, Penick* and other cases could not be barred from participating in the determination of which governmental entity bears responsibility for the costs of a constitutional violation, the districts here cannot be so foreclosed. The existence of a state statute is no impediment to standing. As recently as June 30, 1982, this Court not only upheld the claim of a local school board that a state statute violated the Fourteenth Amendment, but sustained an award of attorneys fees to the local board from the state. *Washington, et al.* v. *Seattle School District No. 1, et al.*, —— U.S. ——, 50 U.S.L.W. 4998, 5006 n.31 (June 30, 1982).

2. Even if the Transfer Act were applicable in its terms to this case, the court of appeals correctly concluded that the district court would not be bound by its terms in assessing the costs of correcting the violation. The existence of a state statute purporting to absolve the state or diminish its responsibility for the consequences of unconstitutional conduct does not give rise to a claim under the Tenth Amendment. As this Court said in *Milliken II*:

> The Tenth Amendment's reservation of non-delegated powers to the states is not implicated by a federal court judgment enforcing the express prohibition of unlawful state conduct enacted by the Fourteenth Amendment. (Citation omitted). Nor are the principles of federalism abrogated by the decree. 433 U.S. at 291.

3. Contrary to petitioners' assertion (p. 9), no additional or novel problem is raised by inclusion in the order of a provision specifying that payments required to be made by the State "shall first be paid from funds not appropriated for any other purpose" (paragraph 6, Pet. App. at A-33).[4] As the court of appeals pointed out, the paragraph does not operate to prevent the Indiana legislature from allocating funds in the future in any way it chooses as long as it appropriates amounts sufficient to meet the costs of desegregation. Rather, lacking a specific appropriation at the time the order was entered, the provision was necessary to insure that the State would not shift the financial burden to IPS and suburban school districts, requiring them to decrease the educational offering to their students. As the court said, "[i]nnocent black children in IPS have suffered enough." [Pet. App. at A-10].[5]

---

[4] Petitioners' reprint of the order omits the important word "other" from the sentence.

[5] A similar order had been entered by the district court in 1979 in the judgment directing the State to pay the costs of an ancillary

Ample precedent for this aspect of the order is found in *Milliken II* where Justice Powell observed:

> Ordinarily, a federal court's order that a state pay unappropriated funds to a locality would raise the gravest constitutional issues. . . But here, in a finding no longer subject to review, the State has been adjudged a participant in the constitutional violations, and the State therefore may be ordered to participate prospectively in a remedy otherwise appropriate. 433 U.S. at 295.

That is precisely the situation in this case.

4. A last, curious argument, raised by petitioners for the first time here (pp. 10-13) is based on the belatedly arrived-at view that the final substantive relief awarded in this case is inequitable. Petitioners now adopt a position urged unsuccessfully by IPS alone in previous proceedings—that a consolidation or reorganization of school districts in Marion County would have been better calculated than interdistrict transfers to redress the constitutional violation and to provide an equitable remedy to IPS black students. Building on this notion, petitioners suggest that unless local school districts are taxed with a part of the costs of the desegregation decree, they will have no incentive to move toward consolidation or redistricting.

A complete answer to this claim is that the court of appeals rejected consolidation or reorganization as a proposed remedy, stating that while "[t]he most closely tailored remedy would likely be one that would allow IPS to expand to the city borders," it "would have been far more intrusive into local political processes." 637 F.2d at 1114. When this Court denied certiorari in 1980 (449 U.S. 838) the judgment became final.

---

relief relating to interdistrict desegregation. 506 F. Supp. at 674. The order was affirmed by the court of appeals simply on the citation of *Milliken II*. 637 F.2d at 1116.

It may be added that even if petitioners' objections were timely, it would clearly be inappropriate to deal with the problem by affixing liability for costs upon local school districts which have been adjudged not responsible for the violations which support the interdistrict remedy. 637 F.2d 1101, 1105-1108, 1116.[6] If the State, which created the constitutional problem in the first place by freezing the boundaries of IPS, wishes to deal with the inequities it perceives through consolidation or reorganization of school districts, it of course has authority to do so by appropriate legislation.

CONCLUSION

For the foregoing reasons, the State's petition presents no issue worthy of review by this Court. The orders below determining state liability are simply a routine application of long established principles frequently reiterated by this Court. Therefore, the State's petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN WOOD
BAMBERGER AND FEIBLEMAN
500 Union Federal Building
Indianapolis, Indiana 46204
317/639-5151

WILLIAM L. TAYLOR
CENTER FOR NATIONAL POLICY REVIEW
Catholic University Law School
Washington, D.C. 20064
202/832-8525

Attorneys for Respondent

Dated: October 18, 1982

[6] The court of appeals affirmance of the financing order was based on those previous rulings.

No. 82-479

Supreme Court, U.S.
FILED
NOV
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. ORR,
AS GOVERNOR OF THE STATE
OF INDIANA, *et al.*
Petitioners,

v.

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS, *et al.*,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

BRIEF OF RESPONDENTS BUCKLEY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN O. MOSS
JOHN PRESTON WARD
156 East Market Street
Suite 701
Indianapolis, Indiana 46204
(317) 635-1945

CHARLES D. KELSO
McGeorge School of Law
3200 Fifth Avenue
Sacramento, California 95817
(916) 739-7191

Attorneys for Respondents Buckley

Central Publishing Company, Inc., Indianapolis, IN 46206

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1) Did the Court of Appeals err in holding that the Indiana Transfer Statute does not apply where racial discrimination by the State of Indiana is the basis for an interdistrict remedy?

2) Did the District Court abuse its discretion in prohibiting the State of Indiana from paying court-ordered desegregation costs from funds already appropriated for other educational purposes?

STATEMENT OF THE CASE

On March 26, 1982, a three-judge panel of the United States Court of Appeals for the Seventh Circuit unanimously agreed on several holdings:

(1) The State of Indiana, a defendant guilty of an interdistrict violation of the constitution with respect to racial discrimination in public schools, was properly assessed all the costs of an inter-district remedy. (Petition for Certiorari, A-2).

(2) The Indiana Transfer Statute, I.C. 20-8.1-6.5-1 *et seq.*, which allocates certain school desegregation costs, by its own terms applies only to constitutional violations by a transferor school corporation and does not apply when, as here, the sole basis for an interdistrict remedy is an interdistrict violation by the State. (Petition, A-4, 5)

(3) Even if the Transfer Statute were applicable, the District Court would not necessarily be bound by its terms since the Tenth Amendment's reservation to the states of non-delegated powers is not implicated by a federal court judgment which enforces express prohibitions of the Fourteenth Amendment. (Petition, A-5, 6).

The only issue on which the panel divided is whether the District Court abused its discretion (as dissenting Judge Posner urged) or did not (as Judges Swygert and Cummings concluded) when the District Court, after allocating all remedial costs to the State of Indiana, went on in Section 6 of its order to prohibit the State from carving out desegregation funds from educational distributions currently appropriated by state law.

SUMMARY OF ARGUMENT

The issues in this case are of little concern to others than the parties herein and are not likely to arise again. There is no conflict among the Circuits.

The Seventh Circuit correctly interpreted the Indiana Transfer Statute. Also, it properly found that the District Court did not abuse its discretion by insuring in its remedial order that money to pay the cost of desegregation was not obtained by reducing payments currently appropriated for educational purposes to the participating parties or to other school districts.

ARGUMENT

1) The Indiana Transfer Statute allocates some of the costs of a court ordered desegregation remedy in one specified kind of situation. The State of Indiana contends that the Seventh Circuit did not give appropriate deference to that statute. (Petitioner's brief, 4). To the contrary, however, the Court of Appeals fully considered the statute but held, correctly, that it did not apply to the facts of this case.

The Court first pointed out that the Indiana Transfer Statute, by its own terms, applies only where a transferor corporation has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing *de jure* racial segregation of the students within its border. (Petitioner's Brief, A-4). The Court of Appeals next pointed out that this case involves the remedy for interdistrict violations for which the State of Indiana is responsible. (Petitioner's Brief, A-4, 5). It follows, therefore, as the Seventh Circuit held, that the Transfer Statute is not applicable to the case.

Even if the Seventh Circuit's interpretation of the statute was in error, the petition for a writ of certiorari should be denied. No parties other than the present litigants are likely ever to be affected by the decision and there is no conflict among the Circuits.

2) It is not of substantial importance to other states or even to Indiana whether Section 6 of the District Court's order was an abuse of discretion. The effect of Section 6 is that until the next session of the Indiana General Assembly, the cost of desegregation must first be paid from unappropriated funds and the State must not reduce payments under applicable state law to the participating parties or to any other school districts. However, when the General Assembly next meets in regular or special session, it can legislate whatever taxes and/or appropriations it thinks will best meet its obligations under the

desegregation order, provided only that it does not place the burden of the desegregation process on educational distribution funds. Section 6 thus has only a minor impact on the State's freedom to design its response.

Petitioner seeks to find a 10th Amendment issue in the case. However, the Chief Justice, writing for the Court in *Milliken v. Bradley*, 433 U.S. 267, 291 (1977), said that:

> The Tenth Amendment's reservation of non-delegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment.

Further, the District Court wisely exercised its discretion. If Indiana had reduced its state-wide school distributions in order to pay for desegregation in Marion County, the success of the District Court's desegregation remedy might have been jeopardized by resentments.

The District Court wisely insured by Section 6 of its order that the costs of the desegregation process would be broadly shared by the people of Indiana and would not be taken from appropriations theretofore earmarked for educational purposes in the affected school districts and in other school districts.

CONCLUSION

Wherefore, Respondents Intervening Plaintiffs Buckley pray the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

JOHN MOSS
JOHN PRESTON WARD
CHARLES D. KELSO

Office - Supreme Court, U.S.
FILED
OCT 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. ORR,
AS GOVERNOR OF THE STATE
OF INDIANA, *et al.*
Petitioners,

v.

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS, *et al.*,
Respondents.

BRIEF OF LAWRENCE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES W. HUNTER
810 King Cole Building
7 North Meridian Street
Indianapolis, Indiana 46204
(317) 637-2411
Attorney for the Metropolitan School District of Decatur Township, Marion County, Indiana

LEWIS C. BOSE
WILLIAM M. EVANS
DAVID R. DAY
BOSE McKINNEY & EVANS
1100 First Federal Building
Indianapolis, Indiana 46204
(317) 637-5353
Attorneys for Metropolitan School Districts of Lawrence, Warren and Wayne Townships, Marion County, Indiana

Central Publishing Company, Inc., Indianapolis, IN 46206

TABLE OF CONTENTS

	Page
Statement of Case Relevant to this Appeal	2
Summary of Argument	6
Argument	7
A. Standing	7
B. The Indiana Transfer Act	9
C. The Tenth Amendment Issue	13
D. The "Guilt" of the Suburban School Districts..	17
Conclusion	20

TABLE OF AUTHORITIES

Cases	Page
Akron Bd. of Education v. State Bd. of Education, 490 F.2d 1285 (6th Cir.), *cert. denied*, 417 U.S. 932 (1974)	8
Bradley v. Milliken, 484 F.2d 215 (6th Cir. 1973), *rev'd.*, 418 U.S. 717 (1974)	9
Butner v. United States, 440 U.S. 48 (1979)	13
Evans v. Buchanan, 582 F.2d 750 (3d Cir. 1978), *cert. denied*, 446 U.S. 923 (1980)	15
Liddell v. Bd. of Education of the Cioty of St. Louis, 667 F.2d 643 (8th Cir.), *cert. denied*, 50 U.S.L.W. 3447 (December 1, 1981)	16
Milliken v. Bradley, 418 U.S. 717 (1974)	2, 6, 10, 11, 13, 17
Milliken v. Bradley, 433 U.S. 267 (1977)	7, 13, 14, 15, 16
Peneck v. Columbus Bd. of Education, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 72 L.Ed.2d 135 (1982)	16
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	8
Reed v. Rhodes, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 72 L.Ed.2d 135	16
Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1 (1971)	13
United States v. Board of School Commissioners, 637 F.2d 1101 (7th Cir.); *cert. denied*, 449 U.S. 838 (1980)	2, 3, 12, 13, 15, 17
United States v. Board of School Commissioners, 573 F.2d 400 (7th Cir. 1978)	12

United States v. Board of School Commissioners, 456 F. Supp. 183 (S.D. Ind. 1978), *aff'd*, 637 F.2d 1101, *cert. denied*, 449 U.S. 838 (1980) 11

United States v. Board of School Commissioners, 419 F. Supp. 180 (S.D. Ind. 1975) 11, 12, 19

United States v. Board of School Commissioners, 368 F. Supp. 1191 (S.D. Ind. 1973), *vacated*, 503 F.2d 68 (7th Cir. 1974) 3, 9, 10

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 8

Statutes

IC 20-8.1-6.5 (Indiana Transfer Act) 3, 4, 6, 9, 10, 11, 12, 13

No. 82-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. ORR,
AS GOVERNOR OF THE STATE
OF INDIANA, *et al.*
Petitioners,

v.

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS, *et al.*,
Respondents.

BRIEF OF LAWRENCE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI[1]

[1]As used in this brief, "State" refers to the Petitioners, Robert D. Orr, et al.; "Lawrence Respondents" refers to the Metropolitan School Districts of Decatur, Lawrence, Warren and Wayne Townships; "IPS" refers to the Indianapolis Public Schools; "State Petition" refers to the petition for certiorari filed by the State; and "State App." refers to the appendix included in the State Petition.

The only issue involved in this case, as noted by both the majority and the dissent in the Seventh Circuit Court of Appeals ("Seventh Circuit"), is who shall pay the costs of the interdistrict school desegregation plan in Marion County, Indiana. State App. A-2, A-14. The District Court imposed these costs on the State of Indiana, on the grounds that it was the State's violation of the Constitution which served as the basis of the interdistrict remedial orders. State App. A-41. The Seventh Circuit affirmed, stating that the District Court "did what was within its authority — order a wrongdoer to pay the cost of remedying its wrongdoing." State App. A-11.

Lawrence Respondents submit that the Seventh Circuit did not err in affirming the District Court's decision and, consequently, that the State Petition should be denied.

Statement of Case Relevant to this Appeal

This case has been pending since 1968 and, consequently, previous opinions have traced its history. *See*, 637 F.2d 1101 (7th Cir. 1980). This history will not be repeated here but instead Lawrence Respondents will summarize only those facts and circumstances leading to the District Court's order that is the subject of the State Petition.

In 1980, this Court denied petitions and cross-petitions for writs of certiorari to the Seventh Circuit seeking review of a decision by that court which had affirmed the District Court's order regarding both the validity and scope of a school desegregation plan for Marion County, Indiana. 637 F.2d 1101, *cert. denied*, 449 U.S. 838 (1980). This denial of certiorari meant that at least the following determinations became the law of this case:

1. The State's adoption of certain statutes, principally the "Uni-Gov" legislation, inhibited desegregation in Marion County, Indiana, and formed the legal basis, within the meaning of *Millikin v. Bradley*, 418 U.S. 717 (1974), for the imposition of an interdistrict school remedy. 637 F.2d 1105-8, 1112-4.

2. Although certain actions of the Housing Authority of the City of Indianapolis ("HACI") also contributed to desegregation in Marion County, Indiana, 637 F.2d 1108-11, these actions would not support the desegregation plan ordered by the District Court but would have supported only a more limited plan. 637 F.2d at 1114.

3. IPS' acts of *de jure* segregation within its own school boundaries did not contribute to interdistrict desegregation in Marion County, Indiana. 637 F.2d at 1111-2.

4. The Indiana Transfer Act did not provide an independent basis for the imposition of an interdistrict desegregation remedy. 637 F.2d at 1112.

5. The District Court's plan of interdistrict school desegregation, a plan requiring the transfer of certain black IPS students to suburban Marion County school corporations, but not otherwise ordering any reorganization of the school corporations, was an appropriate remedy for the interdistrict violations found by the District Court. 637 F.2d 1112-5.

6. No suburban school district committed any act of *de jure* segregation. In 1973, the District Court stated, "There was no evidence that any of the added defendant school corporations have committed acts of *de jure* segregation directed against Negro students living within their respective borders. 368 F.Supp. 1191, 1203. The District Court restated this finding in its 1981 decision, "This Court found no constitutional violation by the Added School Defendants." State App. A-40. The dissent in the Seventh Circuit acknowledged "that the suburban school districts were absolved from any share of legal liability for the segregation of the Marion County schools." State App. A-16.

This Court's denial of the petitions and cross-petitions for certiorari in 1980 meant that interdistrict school desegregation would take place in Marion County starting

with the 1981-82 school year in accordance with the District Court's plan which transferred specified numbers of black IPS students to surrounding Marion County school districts. Lawrence Respondents constituted four of the six school districts charged with the responsibility of educating those black school children. Early in 1981, it became apparent that there were serious questions as to who would pay the cost of educating those black IPS students in these districts.

The State appeared content to rely upon the Indiana Transfer Act,[2] first adopted in 1974, which, if applicable, would have placed the majority of these costs on IPS and limited the State's liability to essentially one-half of the costs of transportation. The 1981 Indiana General Assembly, however, had adjourned without appropriating any monies to fund the state's obligations under that statute. State App. A-2. IPS, on the other hand, could not assure the suburban school districts that it would pay the costs of desegregation imposed on it under the Indiana Transfer Act, in part, because IPS questioned the applicability of that act to this case and, in addition, as the District Court subsequently found, IPS was in a deficit financial position and could not pay those costs. State App. A-42.

Neither IPS, nor the suburban school corporations, such as Lawrence Respondents, could simply raise their own taxes to pay for these costs and then await the conclusion of any dispute between IPS and the State regarding responsibility for those costs. School district tax rates were essentially frozen by Indiana statute.

Faced with the uncertainty as to the source and amount of financing, and the inexorable fact that school would start in August, 1981, three of the suburban school districts,

---

[2]This statute is codified at IC 20-8.1-6.5 and reproduced at State App. A-46.

Lawrence, Warren and Wayne, requested the District Court's approval of a plan under which they would annex the areas in IPS from which they would receive black IPS students. As time continued to pass without a ruling on that request, these same three school districts, together with the Metropolitan School District of Decatur Township, presented an alternative petition to the District Court seeking to impose the cost of school desegregation on the State of Indiana, arguing that the State's interdistrict violation formed the only basis for the desegregation remedy imposed by the District Court, and, consequently, it was not inequitable to impose on the State the cost of correcting that violation.

On July 17, 1981, the District Court, although finding that the proposal to annex IPS territory would offer "the best possibility for successful and long-lasting desegregation" (State App. A-42), adopted the alternative plan submitted by Lawrence Respondents with some modification. State App. A-39. The plan itself, set forth in State App. A-22 through A-36, requires the State to pay desegregation costs consisting primarily of the *excess* costs of educating the black IPS students in the suburban school districts over the cost of educating them in IPS and to pay the transportation costs incurred under the plan. In addition, the plan provides a mechanism to resolve any disputes with respect to the computation or amount of any payment required under the plan.

The Seventh Circuit affirmed the District Court in a divided opinion on March 26, 1982. State App. A-1. All members of that panel, however, voted to deny the petition for rehearing and no active member of the Seventh Circuit requested a vote on the suggestion of the State that the matter be heard *en banc*. State App. A-20.

Summary of Argument

Both the majority and dissent in the Seventh Circuit recognized that the only issue in the State's appeal is who shall pay the cost of interdistrict desegregation in Marion County, Indiana. Although the State has ostensibly raised only two questions with respect to this issue in its petition for certiorari, the State has urged at least the following grounds for reversal of the Seventh Circuit: (1) Lawrence Respondents do not have standing to raise the issue of financing the desegregation plan; (2) the order fails to give effect to the Indiana Transfer Act; (3) the order violates the Tenth Amendment; and (4) the District Court erred in failing to impose some or all of the costs of desegregation on the suburban school corporations.

With respect to the standing issue, Lawrence Respondents constituted four of the six suburban school districts charged with the responsibility of educating black IPS students transferred to them under the Court order. Without assurance of adequate funding, these school districts could not implement the desegregation plan and the education of both the transferred students and the students resident in the suburban school districts would have suffered irreparable injury. Lawrence Respondents' interest in protecting the orderly implementation of the plan and the education of their students gave them standing to seek resolution of the funding issue by the District Court.

The State's reliance on the Indiana Transfer Act as a funding mechanism for the desegregation plan ignores the fact that the statute, by its terms, simply does not apply to this case. The requirements for application of that statute, passed in 1973, conformed to school desegregation law as it then existed. This Court's decision in *Milliken v. Bradley*, 418 U.S. 717 (1974) vitiated the effect of the Indiana Transfer Act and rendered it inapplicable to this case.

In requiring the State to pay the cost of interdistrict desegregation, the District Court followed the well-established principles of this Court which require the scope of a school desegregation remedy to fit the nature of the constitutional violation. In this case, it was the State's constitutional violation which formed the basis for the District Court's interdistrict desegregation plan and, consequently, it was not an abuse of discretion to require the State to pay the costs of that plan. The State's argument that this order violates the Tenth Amendment is completely answered by this Court's decision in *Milliken v. Bradley*, 433 U.S. 267 (1977).

Finally, the State's attempt to impose the desegregation cost on the suburban school districts is unsupported by logic, by the facts of this case or by any precedent of this Court or any other court. The suburban school districts were absolved of any legal liability for the constitutional violations in this case and, therefore, it would be inequitable to impose any of the cost of desegregation on the suburban school districts.

Argument

A. *Standing*

With respect to the question of their interest in the issue of how desegregation costs will be paid, *i.e.*, standing, Lawrence Respondents would first note that this issue was first raised by the dissent in the Seventh Circuit and has been urged by the State only in its petition for rehearing in the Seventh Circuit and now before this Court. Aside from whether the State has waived this issue, however, the practical considerations underlying Lawrence Respondents concern with respect to the question of financing justifies their standing to have that issue determined by the District Court. *See, supra*, pp. 3-4. Without adequate financing, the integration plan could not have been implemented successfully nor could the educational programs for resident students have been maintained.

In the summer of 1981, the suburban schools were faced with the responsibility of educating students transferred from IPS. This education would not be free. Further, absent some resolution of the financing issue, the suburban school districts would have to incur the costs of education and then look to some uncertain, and perhaps non-existent, entity for reimbursement of those costs. Even this alternative raised substantial problems for the suburban school districts since they were essentially prohibited from raising additional tax revenues under Indiana statute and, consequently, any additional cost of educating black IPS students would have to come out of funds budgeted for other programs.

In view of these facts, how can the State logically argue that the suburban school districts had no interest in determining the source, if any, of financing the desegregation costs? Judge Swygert, writing for the Seventh Circuit, recognized the vital interest of the suburban school districts in ascertaining the source and method of funding. State App. A-2. These interests satisfy the requirements of an actual or threatened injury and a concrete factual context embodied in the concept of standing. *See, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

In addition, the District Court found that "failure to fund adequately the education and incidental transportation costs of the transferred IPS students [would] result in irreparable harm to those students and to other students in the Receiving School Corporations...." State App. A-44. Lawrence Respondents, charged with the responsibility of educating these students, surely have standing to protect their students' education from irreparable harm. *Akron Bd. of Education v. State Bd. of Education*, 410 F.2d 1285 (6th Cir. 1974), *cert. denied*, 417 U.S. 932 (1974). *Cf., Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Further, Lawrence Respondents note that IPS, a district with an unquestioned direct interest in the funding issue,

and the intervening plaintiffs, representatives of all black IPS students, joined in the argument before the District Court in support of Lawrence Respondents on the responsibility for funding the desegregation plan and those issues were fully litigated in both the District Court and the Seventh Circuit. Dismissal of the case now on the question of standing would not aid the orderly implementation of school desegregation in Marion County, a process which has progressed peacefully into its second school year.

Because Lawrence Respondents had a direct stake in the outcome of the question of funding raised by their petition to the District Court, they had standing to request a ruling on that issue.

B. *The Indiana Transfer Act*

The State has repeatedly urged the District Court, the Seventh Circuit, and now this Court to construe the Indiana Transfer Act as "entitled to application absent some independent constitutional infirmity." State Petition, p. 8. What the State does not discuss is the finding by both the District Court, State App. A-40, and the Seventh Circuit, State App. A-4, that the Indiana Transfer Act, by its very terms, simply does not apply to this case. In reaching this conclusion, the lower courts have relied upon the history of the enactment of the Indiana Transfer Act, its relationship to the present case and its setting in the context of other school desegregation decisions. A brief summary of these factors demonstrates the correctness of the lower courts' decisions.

In 1973, the only constitutional violation then before the court was the intradistrict violation of IPS and the State's participation in that intradistrict violation. The District Court, relying heavily on the Sixth Circuit's decision in *Bradley v. Millikin*, 484 F.2d 215 (6th Cir. 1973), *rev'd.*, 418 U.S. 717 (1974), ordered an interdistrict desegregation plan for the Indianapolis metropolitan area, including areas outside Marion County. 368 F.Supp. 1191, 1206. The

District Court invited the Indiana General Assembly to enact such a plan and suggested several alternatives for that body to consider. 368 F.Supp. 1223-31. As an interim plan, the District Court ordered the transfer of black IPS students to suburban school corporations both inside and outside Marion County. 368 F.Supp. 1208.

Acting in response to the District Court's invitation, the Indiana General Assembly adopted the Indiana Transfer Act. That act, by its terms, applies only in the event that the following three requirements are fulfilled: (a) a transferor corporation has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing *de jure* racial segregation of the students within its borders; (b) a unitary school system within the meaning of such amendment cannot be implemented within the boundaries of the transferor corporation; and (3) the Fourteenth Amendment compels the court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment. State App. A-66. As can be readily seen, these requirements were closely tailored to the findings of the District Court and the Sixth Circuit in *Bradley* and proceeded on the concept that segregation within a single school system constituted a sufficient basis for an interdistrict school remedy.

The effect of this Court's reveral of the Sixth Circuit in *Milliken v. Bradley*, 418 U.S. 717 (1974) ("Milliken I") on this case was twofold. The first and most immediate impact was to render invalid the District Court's attempt to expand the school desegregation remedy beyond IPS absent a determination that an interdistrict constitutional violation had occurred. The Seventh Circuit acknowledged this first impact in its decision vacating the District Court's 1973 judgment following this Court's decision in *Milliken I*. 503 F.2d 68. The second impact of *Milliken I*, although

perhaps not recognized by any of the parties to the case at the time, was to destroy one of the legal underpinnings of the Indiana Transfer Act by holding, in effect, that a unitary school system can always be established within the geographical boundaries of the district committing *de jure* segregation, for as this Court stated in *Milliken I:*

> In such a context, terms such as "unitary" and "dual" systems, and "racially identifiable schools," have meaning, and the necessary federal authority to remedy the constitutional wrong is firmly established. But the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. Disparate treatment of white and negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system.
>
> 418 U.S. at 746.

In short, after *Milliken I*, if the only act of school segregation in this case had been committed by IPS, then the remedy would have been limited to IPS. This rule of law is clearly inconsistent with the provisions of the Indiana Transfer Act which contemplates a court ordering transfer of students across school district lines in order to remedy desegregation occurring in only one district. Thus both the District Court and the Seventh Circuit did not err in failing to apply the Indiana Transfer Act to this case.

The State attempts to avoid this conclusion by construing certain of the holdings of the District Court prior to its 1981 decision as specifically finding the elements necessary for application of the Indiana Transfer Act. In particular, the State cites the 1975 opinion of the District Court, 419 F. Supp. 180, 184; an unpublished opinion of the District Court dated June 2, 1978, and reprinted at State App. A-54, and the opinion of the District Court at 456 F. Supp. 183, 191. The State says, quite incorrectly, that these opinions

"were never challenged or vacated in any of the numerous appeals in this case." State Petition, p. 4.

The 1975 opinion of the District Court ceased to have any effect when this Court vacated the Seventh Circuit's decision affirming that opinion and the Seventh Circuit, on remand from this Court, vacated the 1975 judgment of the District Court in an opinion reported at 573 F.2d 400.

In an unpublished opinion in 1978, the District Court took the position that the Indiana Transfer Act could form the basis of an interdistrict school remedy without regard for the question of whether an interdistrict violation occurred.[3] In its decision otherwise affirming the District Court's finding that an interdistrict violation did occur and that a desegregation plan was necessary to correct that violation, the Seventh Circuit specifically disapproved the finding that the Indiana Transfer Act afforded an independent substantive basis for the interdistrict desegregation plan. 637 F.2d at 1112.

In short, the District Court opinions cited by the State only considered the Indiana Transfer Act as a substantive basis for the imposition of the plan itself. These opinions have either been vacated by the Seventh Circuit or specifically disapproved by that court. No decision prior to the one now under appeal has considered the Indiana Transfer Act with respect to the question of funding the desegregation plan, a fact recognized by the Seventh Circuit. State App. A-4. Consequently, the decisions cited by the State bear little relevance to the issue presented here.

The decision now before this Court is the only decision in which the District Court considered directly the application of the Indiana Transfer Act to the funding

---

[3]At the time of this opinion, the case was before the District Court pursuant to the remand of this Court and the Seventh Circuit for consideration of the questions of discriminatory intent.

issue. Here the District Court held that the act did not apply, State App. A-70, and the Seventh Circuit affirmed that holding, State App. A-4- A-5. These constructions of State law are generally not reviewed by this Court since "the federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues." *Butner v. United States*, 440 U.S. 48, 58 (1979).

In its only prior decision regarding the financing of desegregation, the District Court imposed all of the costs of certain ancilliary programs on the State and this allocation had been affirmed by the Seventh Circuit. 637 F.2d at 1116.

Since the Indiana Transfer Act, by its own terms, does not apply to this case, the courts below did not err in failing to follow that statute.

C. *The Tenth Amendment Issue*

The State has previously suggested that the District Court abused its discretion in assigning all of the costs to the State, and not placing some of those costs on IPS, HACI or the suburban school districts. The discretion the District Court exercised in this matter was guided by the well-established principle in school desegregation cases that "the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *Milliken I*, 418 U.S. at 738. Here the District Court's plan was in response to the State's constitutional violation and the remedy imposed was limited to the wrongdoer.

The State argues that the District Court abused its discretion because its order violates the Tenth Amendment in that it interferes with the State's "inherent authority to structure its own finances." State Petition, p. 7. Lawrence Respondents submit that this Court answered this argument completely in *Milliken v. Bradley*, 433 U.S. 267

(1977) (*"Milliken II"*). In that case, Chief Justice Burger, writing for the Court, swept away the Tenth Amendment objection of Michigan to paying a portion of the costs of certain educational components of the Detroit desegregation plan, stating:

> The Tenth Amendment's reservation of nondelegated powers to the state is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment. (Citation omitted). Nor are the principles of federalism abrogated by the decree.
>
> 433 U.S. at 291.

In his concurring opinion to that case, Justice Powell elaborated on Michigan's concerns and their irrelevance to the constitutional questions relating to the scope of the remedy that were before this Court:

> Thus the only complaining party is the State of Michigan (acting through state officials), and its basic complaint concerns *money*, not desegregation. It has been ordered to pay about $5,800,000 to the Detroit School Board. This is one-half the estimated "excess costs" of four of the eleven educational components included in the desegregation decree.
>
> * * *
>
> The State Board normally would be enthusiastic over enhancement of these programs so long as the local school board could fund them without requiring financial aid from the state. It is equally evident that the state probably would resist a federal-court order requiring it to pay unappropriated state funds to the local school board regardless of whether violations by the local board justified the remedy. The state's interest in protecting its own budget — limited by legislative appropriations — is a genuine one. But it is not an interest that is related, except fortuitiously, to a claim that the desegregation remedy may have

> exceeded the extent of the violations.
>
> 433 U.S. at 293-94, 295-96 (Emphasis in original).

The State would distinguish *Milliken II* by suggesting that the District Court's order violates the language in that decision which states:

> The district court has neither attempted to restructure local governmental entities nor to mandate a particular method or structure of state or local financing.
>
> 433 U.S. at 291.

As further support for this position, the State cites *Evans v. Buchanan*, 582 F.2d 750 (3d Cir. 1978), which reversed the action of the district court in setting a local property tax rate.

But the judgment of the District Court at issue here does not contain the restructuring forbidden by *Milliken II*, nor does it result in interference with state and local processes condemned in *Evans*. As the Seventh Circuit previously noted, the District Court did not exercise its undoubted power to restructure school organization in Marion County. 637 F.2d 1114. Nor did the District Court mandate a particular method of financing. The District Court did not establish tax rates as in *Evans* nor change the method or structure by which tax rates are to be determined. The District Court did not suggest a method by which the State will finance its obligations under the judgment. As the Seventh Circuit noted, the State remains free to cut programs rather than raise taxes and to cut programs as it, and it alone, chooses. State App. A-11. The only thing the State may not do is totally shirk its responsibility to pay for the extra educational costs incurred in connection with a transfer of students resulting from the State's interdistrict violations. Also, it may not accomplish indirectly what it cannot do directly — impose that cost solely on the other parties to this action.

The State can find no support for its argument in any other school desegregation decision on the responsibility for desegregation costs. Both the Eighth Circuit[4] and Sixth Circuit[5] have imposed such costs on the state where the state shared in the responsibility for the racial segregation. Although these decisions have limited the state's liability to approximately one-half of the costs of desegregation, these decisions involved desegregation solely within one school district in a situation where that district itself had committed independent acts of *de jure* segregation. Thus, as the Seventh Circuit found, these cases are clearly distinguishable from the present case where the State alone committed the interdistrict violation giving rise to the specific interdistrict remedy imposed by the District Court. State App. A-7 - A-8.

The State further tries to distinguish this case from *Milliken II* by suggesting that the existence of the Indiana Transfer Act and the requirement of the District Court that the State pay costs from otherwise unappropriated funds violates the mandates in *Milliken II*. With respect to this first issue, the State seems to be suggesting that if a state enacts a statute imposing desegregation costs solely on the school districts involved in the desegregation plan, then the State can avoid responsibilities for those costs regardless of whether the State committed interdistrict or intradistrict school violations.

Lawrence Respondents submit that the equity power of the federal district courts in remedying school discrimination are not so easily avoided. The requirement of this Court is that the remedy imposed by the federal district courts be commensurate with the violation found

---

[4]*Liddell v. Bd. of Education of the City of St. Louis*, 667 F.2d 643 (8th Cir.), *cert. denied*, 50 U.S.L.W. 3447 (December 1, 1981).

[5]*Reed v. Rhodes*, 662 F.2d 1219 (6th Cir. 1981), *cert. denied*, 72 L.Ed.2d 135 (1982); *Peneck v. Columbus Bd. of Education*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 72 L.Ed.2d 135 (1982).

by those courts, *Milliken I*, and what could be more equitable than requiring the State to pay the costs of a plan which resulted from its own constitutional violation? Or, as the District Court stated, "Because the decision of this Court found [the State] responsible for interdistrict fourteenth amendment violations and fixed the remedy therefor, the State should be required to pay the costs of that remedy." State App. A-41.

The decision of the District Court requiring funds to finance the plan to come from monies not otherwise appropriated by the State also does not violate state sovereignty. In light of the circumstances facing the District Court at the time the financing plan was approved, the Court had little choice under Indiana law but to order the funds to come from otherwise unappropriated monies. As the Seventh Circuit noted, the District Court did not interfere with the State's unquestioned right to appropriate monies to pay those costs from whatever source the State chose, when the State does choose to appropriate monies. State App. A-11.

D. *The "Guilt" of the Suburban School Districts*

In this Court, the State has apparently abandoned its prior efforts to shift the desegregation costs to IPS or HACI. This is not surprising, however, in view of the Seventh Circuit's findings that the HACI violation would not support the scope of the District Court's plan and that the IPS intradistrict violations were without interdistrict effect. 637 F.2d at 1111-4. Instead, the State has focused on the suburban school districts and the actions of their patrons' representatives in the Indiana General Assembly.

The State has seized upon a novel theory of the dissent in the Seventh Circuit, a theory which suggests that only a portion of a state should be held responsible for acts of the state's legislature. The State has combined this theory with its own novel theory, that the decision of the District Court

is inequitable because it does not provide incentives for the parties to "explore alternative desegregation plans or to modify what is a patently flawed final substantive decree," to argue that the suburban school districts should be forced to pay an unspecified portion of the desegregation costs. State Petition, p. 11. In fact, the State goes so far as to suggest that the decision of the District Court awards state funds "to a primary wrongdoer, upon that wrongdoer's own petition." State Petition, p. 13. In short, it appears that the State, by some form of legal legerdemain, is attempting to create a violation which has been specifically found not to exist, to avoid responsibility for a violation that has been found to exist, and to question the validity of a *final* judicial decree.

With respect to the alleged suburban school liability for the interdistrict violation, the law in this case is abundantly clear. The District Court found that the suburban school corporations did not commit any act of segregation. No one has questioned this finding, first made in 1973.

The dissent in the Seventh Circuit, in an argument now championed by the State, argues that the suburban school districts should bear responsibility for the cost of desegregation because suburban Marion County legislators procured the "school exception" to Unigov, an exception which proved to be the basis of the District Court's interdistrict school remedy and, therefore, the constituents of those legislators, *i.e.*, the patrons of the suburban school districts, should be punished by being forced to bear the costs of desegregation.

Neither the State, nor the dissent before it, has cited any precedent for this theory that only certain citizens of a State should bear resbonsibility for an act of the State's entire legislative body. Furthermore, Lawrence Respondents note that the assumptions underlying this theory are not supported by the record in this case and that adoption of this theory would raise difficult questions in both this case and future decisions.

Underlying the State's arguments is the assumption that legislators outside Marion County apparently voted for Unigov with the school exclusion either because they did not understand the question, did not care, or both. Yet it was this very failure of legislators outside Marion County to be concerned about segregation in IPS which led the District Court to conclude that these legislators had violated their constitutional duty. 419 F. Supp. 183.

Lawrence Respondents submit that the assessment of "blame" for Unigov serves no purpose. The acts of the majority of the General Assembly are, by definition, the acts of the State and the vote of an individual legislator for an act can not impose the consequences of the act's passage solely on his constitutents any more than the vote of an individual legislator against an act can relieve his constitutents from the consequences of its passage. Yet this is precisely the rationale used by the State in an attempt to impose the costs of desegregation upon the patrons of the suburban school districts because their legislators were "responsible" for the interdistict violation.

Accepting the State's theory would require courts to scrutinize each legislator's vote to determine which constituents would bear the burden of any particular legislative act.[6] Perhaps that vote would only be a presumption as to the constituents' responsibility, however, and the constituents could overcome that presumption by proving they really did not support the act and, consequently, they should not be forced to obey it or bear its consequences. The lack of logic or equity in such a theory is equalled only by the lack of precedent supporting it.

The State now expresses concerns regarding the fact that the parents of black IPS students transferred to the

---

[6]This might lead to some interesting problems in this case since two of the "guilty" suburban legislators voted against Uni-Gov. Should their constituents be exempted from either the desegregation plan or the cost thereof?

suburban school districts can not vote for school boards in the districts their children attend school, or otherwise participate formally in the government of those schools. The State has been the party to this case at all times in which the desegregation plan has been considered and has participated in all proceedings resulting in implementation of that plan. The desegregation plan ordered by the District Court has been affirmed on appeal and this Court has denied review of that plan. It seems a bit unusual for the State to raise its concerns about the plan for the first time in a petition for certiorari to this Court, after the plan has been rendered as part of a final decree and implemented for two school years, and only in connection with the question of whether the State should bear the costs of that decree.

Lawrence Respondents submitted a plan which called for annexation of a portion of IPS in the remedy phase of this case in 1978, partially because a simple transfer of students without territory would deprive parents of the right to vote for the school board. The Lawrence, Warren and Wayne school districts stated their willingness to annex that portion of IPS from which they receive black students again in 1981.

Lawrence Respondents firmly believe, however, that it is too late for the State to obtain reversal of the decree ordering a desegregation plan after this Court has denied certiorari to review the plan and, in any event, that "shortcomings" in the plan now perceived by the State do not justify allowing the State to escape responsibility for desegregation costs incurred in implementing the plan as ordered by the court.

Conclusion

The duty of a district court in a school desegration case is to eliminate all vestiges of racial discrimination. To suggest that this duty does not extend to insuring that there

is adequate funding to accomplish that task, or that the source of such funding is not a federal question, is to ignore the reality that educating students requires money.

Given the finding that the State of Indiana is liable for interdistrict segregation in Marion County, the District Court's decree imposing the cost of the interdistrict remedy on the State is hardly extraordinary. Indeed, in light of these findings and the law in school desegregation cases that the remedy must be tailored to the violation, a contrary result would be inconsistent with prior precedents of this Court.

For these reasons, Lawrence Respondents submit that the State's petition should be denied.

Respectfully submitted,

CHARLES W. HUNTER
810 King Cole Building
7 North Meridian Street
Indianapolis, Indiana 46204
(317) 637-2411
Attorney for the Metropolitan School District of Decatur Township, Marion County, Indiana

LEWIS C. BOSE
WILLIAM M. EVANS
DAVID R. DAY
BOSE McKINNEY & EVANS
1100 First Federal Building
Indianapolis, Indiana 46204
(317) 63[illegible]353
Attorneys for the Metropolitan School Districts of Lawrence, Warren and Wayne Townships, Marion County, Indiana

Office - Supreme Court, U.S.
FILED
NOV 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. ORR,
AS GOVERNOR OF THE STATE
OF INDIANA, *et al.*
Petitioners,

V.

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS, *et al.*
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT INDIANA STATE TEACHERS ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD J. DARKO
BAYH TABBERT & CAPEHART
One Indiana Square
Suite #1500
Indianapolis, Indiana 46204
(317) 639-5444

Attorney for Respondent
Indiana State Teachers
Association

Central Publishing Company, Inc., Indianapolis, IN 46206

QUESTIONS PRESENTED

1. Whether the District Court and the Court of Appeals abused their discretion in placing on the State of Indiana the responsibility for financing the remedy for a constitutional violation involving racial segregation among public school districts in Indiana where the constitutional violation was committed solely by the State and not by any of the affected school districts.

2. Whether the District Court and Court of Appeals erred in holding that a state statute apportioning the costs of interdistrict court-ordered transfers among the State and its school districts did not apply to a situation in which the State had been adjudicated the sole violator and, in any event, could not serve to limit the State's liability for its own constitutional violations.

STATEMENT OF THE CASE

Respondent, Indiana State Teachers Association, adopts the statement of the case set out by Respondent, Board of School Commissioners of the City of Indianapolis, in its Brief in Opposition filed herein on October 18, 1982.

SUMMARY OF ARGUMENT

The District Court and the Court of Appeals did not err in imposing the costs of desegregation upon the State of Indiana in circumstances in which the substantive desegregation remedy was necessitated by wrongdoing on the part of the State of Indiana, and was tailored by the District Court to correct the effects of the State's wrongdoing.

The State statute enacted in 1974, is not applicable to the desegregation remedy ordered by the District Court in this case. It was adopted to deal with the costs of desegregation in instances in which one school district engaged in segregation. It was not intended to cover the present situation in which the State itself has been found guilty of segregatory practices. Even if the statute were by its terms

applicable the District Court and Court of Appeals did not err in adopting a different method for allocating the costs of desegregation.

ARGUMENT

ISSUE 1.

The State of Indiana has been found responsible for interdistrict segregation of the schools of Indianapolis and Marion County, Indiana, by virtue of enactment of the Uni-Gov Act and by virtue of discriminatory state housing practices. *United States v. Board of School Commissioners*, 637 F.2d 1101 (7th Cir. 1981); *United States v. Board of School Commissioners*, 573 F.2d 400 (7th Cir. 1978). The Courts below have required that suburban school districts, as subdivisions of the responsible State of Indiana, participate in a desegregation remedy, even though those suburban school districts did not participate in the actual causes of segregation.

The question which Petitioner now seeks this Court to review is "Who should bear the cost of the desegregation plan?". The District Court determined that the State of Indiana should bear a substantial part of the cost because the State, not the individual school districts, was responsible for segregation in the first place. The District Court was affirmed by the Court of Appeals.

A Federal District Court has the power to take all necessary steps to eliminate from the public schools all vestiges of state imposed segregation. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 67, 28 L.Ed.2d 554 (1971). The State of Indiana, already having necessitated participation by the local school districts in the remedial measures, now wants to increase the burden and require the school districts to *pay for the remedy* out of their regular budgets. Desegregation is aimed at the quality as well as equality of education. *Wright v. City Council of Emporia*, 407 U.S. 451, 92 S.Ct. 2196, 33 L.Ed.2d 51 (1972). To require the various school districts to pay for desegregation is to defeat the purpose of quality education

by cutting into the substantive school budgets and thereby reducing the quality of teaching and of education available to transferred students as well as to the resident students of the school districts. Appropriate remedial standards in school desegregation litigation include discretion in the trial court to assess the cost of desegregation upon the State, and other District Courts have required states to bear the costs. *Lidell v. Board of Education of City of St. Louis, Mo.*, 492 F.Supp. 351, 359 (E.D.Mo. 1980); *Reed v. Rhodes*, 455 F.Supp. 569, 606 (N.D. Ohio 1978).

Here, the State of Indiana has been held to be primarily responsible for the interdistrict segregation in Indianapolis and Marion County schools. Therefore, the State of Indiana must bear its "appropriate share" of the cost of desegregation. In this instance, because it has been found to be primarily liable, the State's appropriate share is a substantial part of the cost of interdistrict desegregation, as assessed by the District Court.

A District Court remedy must be designed to restore the victims of discrimination to the position they would have occupied absent the conduct. The nature of the remedy is to be determined by the nature and scope of the Constitutional violation. *Morrilton School District No. 32 v. United States*, 606 F.2d 222 (8th Cir. 1979). The victims of the State's discriminatory actions are the school children and parents of school children in the Indianapolis Public Schools. To require these victims, as taxpayers, to pay for the desegregation plan would be to further victimize them in an effort to right the wrong for which these people have no responsibility. True, these individuals and all citizens of the State of Indiana will bear some of the cost under the District Court's financing plan. However, it would be onerous to make only a small portion of the citizens of Indiana suffer the entire burden as a result of the actions of the Indiana General Assembly and state housing authorities.

The dual system in the Indianapolis schools is not of recent vintage. The instant law suit, still active in the

District Court, was filed in 1968. Many IPS Students have graduated and have become taxpaying citizens of the IPS District. The State would now have them pay to remedy the very dual system which directly injured them as students. Had IPS been solely responsible for interdistrict desegregation, that burden would be an unfortunate necessity. (In fact, IPS has shouldered the entire cost of the Court ordered remedy for intradistrict desegregation.) But to require these individuals to carry a disproportionate share of the cost of remedying the effects of the State's discriminatory acts and policies would be unconscionable. The desegregation plan adopted by the District Court has successfully been in effect for a year and a half, since August, 1981. The financing plan has fairly and justly allocated the costs of the desegregation remedy for the same period of time. Review by this Court of that financing plan is unnecessary and could well be disruptive to a presently harmonious desegregation effort.

ISSUE 2.

The Indiana Transfer Statute, I.C. 20-8.1-6.5-1 *et seq.*, states that it "applies solely in a situation where a court of the United States or of the State of Indiana" has determined that three (3) statutory conditions are in existence. The first of those statutory conditions is that:

> "(a) a transferor corporation has violated the equal protection clause of the fourteenth amendment to the Constitution of the United States by practicing *de jure* racial segregation of the students within its borders...". I.C. 20-8.1-6.5-1.

The desegregation remedy adopted by the District Court and unanimously affirmed by the Court of Appeals does not deal with a situation in which one transferor corporation has violated the equal protection clause by practicing segregation within its borders. To the contrary, the desegregation remedy now in effect in Marion County,

Indiana, was precipitated by the actions of the State of Indiana through its enactment of a governmental reorganization statute "Uni-Gov" and its public housing policies. Nothing in the Transfer Statute evinces a legislative intent that the provisions of the statute should apply to instances of State culpability. There are obvious and significant differences between State culpability and the culpability of an individual school district within its own boundaries.

If the District Court had simply determined that "a transferor corporation has violated the equal protection clause of the fourteenth amendment to the Constitution of the United States" then an interdistrict remedy would not even have been permissible. *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). The Court of Appeals correctly determined that the transfer statute is not even applicable to the desegregation plan now in effect in Marion County, Indiana.

CONCLUSION

Throughout its participation in these proceedings, since 1975, at both the trial and appellate court levels, the Indiana State Teachers Association has devoted its attention to the necessity for developing a desegregation plan which will work. It maintains that the plan adopted by the District Court in July of 1979, which is now in effect throughout Marion County, Indiana, is a just and equitable plan, with the provisions necessary to bring about not simply racial mixing, but harmonious and efficient desegregation benefiting all of the involved students as well as the community at large.

ISTA contents that no aspect of the desegregation plan is more important, nor more central to its harmonious operation, than the District Court Judgment of July 17, 1981, now under consideration. The Judgment imposes the burden for paying a substantial part of the costs of desegregation upon the State of Indiana, rather than upon the Indianapolis Public Schools, or any of the suburban school corporations. The alternative to the District Court Judgment would necessarily have been to pay for desegregation out of already sorely depleted school corporation budgets, thus impeding the education of not only the newly desegregated students, but of every student in the affected area. Bringing about desegregation by reducing the funds available for the education of other school children would have been so unfair, so unjust, as to have threatened the operation of the desegregation plan itself.

To tell black students that they are going to be transported for the purpose of desegregation, and to tell suburban students that they are going to have newly desegregated students in their midst is one thing. To tell *all* of the students and their parents that less money is going to be available for their education as a result of the desegregation process is something else. The District Court

made the right decision, it chose to fund the desegregation plan in the manner most likely to continue the harmonious operation of that plan. It was affirmed by the Court of Appeals.

For the foregoing reasons, the State's Petition for Writ of Certiorari presents no issue worthy of review by this Court. The Orders below imposing upon the State the costs of remedying segregation caused by the State were well within developed standards for remedies in desegregation cases. Any other choice for funding the desegregation plan could well have interferred with the harmonious application of that plan throughout Marion County, Indiana.

Respectfully submitted,

Richard J. Darko

Richard J. Darko

BAYH TABBERT & CAPEHART
One Indiana Square, Suite #1500
Indianapolis, Indiana 46204
(317) 639-5444

Dated November 18, 1982

PROOF OF SERVICE

I, Richard J. Darko, being duly sworn, state that I am the attorney of record for Indiana State Teachers Association and that two copies of the foregoing Brief of Respondent Indiana State Teachers Association in Opposition to Petition for Writ of Certiorari has been served upon the following persons by first class United States mail, postage prepaid, this 16 day of November, 1982.

Lewis Bose, Esq.
William Evans, Esq.
1100 First Federal Building
Indianapolis, IN 46204

James B. Burroughs, Esq.
2560 City County Building
Indianapolis, IN 46204

Richard L. Brown, Esq.
156 East Market Street
Indianapolis, IN 46204

Charles Hunter, Esq.
810 King Cole Building
Indianapolis, IN 46204

Harold E. Hutson, Esq.
1322 Circle Tower Building
Indianapolis, IN 46204

Charles D. Kelso, Esq.
3200 Fifth Avenue
Sacramento, CA 95817

United States Attorney
274 United States Courthouse
Indianapolis, IN 46204

John O. Moss, Esq.
156 East Market Street
Suite #902
Indianapolis, IN 46204

Donald A. Schabel
3300 Indiana Bank Tower
Indianapolis, IN 46204

William O. Schreckengast
380 Main Street
Beech Grove, IN 46107

John Preston Ward
P.O. Box 88392
Indianapolis, IN 46208

John Wood, Esq.
500 Union Federal Building
Indianapolis, IN 46204

William L. Taylor, Esq.
Center for National Policy Rese
Catholic Univ. Law School arch
Washington, D.C. 20064

David Michael Wallman
Deputy Attorney General
219 State House
Indianapolis, IN 46204

Alexander Ross, Esq.
Michael Sussman, Esq.
Civil Rights Division
Department of Justice
Washington, D.C. 20530

Richard J. Darko
Richard J. Darko

BAYH TABBERT & CAPEHART
One Indiana Square, Suite #1500
Indianapolis, Indiana 46204
RJD:sr001/34

Office - Supreme Court, U.S.
FILED
NOV 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-479

In the Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. ORR, ET AL., PETITIONERS

v.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

CHARLES JUSTIN COOPER
Deputy Assistant Attorney General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the district court erred in requiring the State of Indiana to pay the full cost of the remedy for the interdistrict violation for which it was found liable.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Discussion 5

Conclusion 6

TABLE OF AUTHORITIES

Statutes:

Indiana Transfer Act, Pub. L. No. 94, 1974 Ind. Acts 345 (Ind. Code Ann § 20-8.1-6-5 (Burns)) 2

Uni-Gov Act, Ind. Code Ann § 36-3-1-1 *et seq.* (Burns Repl. 1981) 3

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-479

ROBERT D. ORR, ET AL., PETITIONERS

v.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 677 F.2d 1185. The opinion of the district court (Pet. App. A39-A45) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1982. The petition for a writ of certiorari was filed on September 17, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

The United States filed this school desegregation case in May, 1968, against the Board of School Commissioners of the City of Indianapolis, alleging that the Indianapolis public school system (IPS) was racially segregated. After the

district court held that IPS was unlawfully segregated,[1] a class of black IPS students was permitted to intervene as plaintiffs and to file an amended complaint naming outlying school districts, the Housing Authority of the City of Indianapolis, the Metropolitan Development Authority, and the State of Indiana as additional defendants.[2]

Following various trials and appeals,[3] the district court found that the State of Indiana acted "with the racially

---

[1] *United States* v. *Board of School Commissioners of Indianapolis*, 332 F. Supp. 655 (S.D. Ind. 1971), aff'd, 474 F.2d 81 (7th Cir.), cert. denied, 413 U.S. 920 (1973).

[2] On July 20, 1973, the court held that "the only feasible desegregation plan involves the crossing of the boundary lines between IPS and adjacent or nearby school districts * * *" (368 F. Supp. 1191, 1205 (S.D. Ind.)). In response to the court's directive (*id.* at 1224-1227), the State General Assembly enacted the "Indiana Transfer Act," Pub. L. No. 94, 1974 Ind. Acts 345 (Ind. Code Ann. 20-8.1-6.5-1 (Burns)) which became effective February 20, 1974. That statute, which apportions the cost of interdistrict transfers between the transferor school corporation and the state, applies only after a court has made the following findings and conclusions and all appeals have been exhausted (Pet. App. A-3 to A-4; 456 F. Supp. 188, 191 (S.D. Ind. 1978)):

> (a) A transferor corporation has violated the equal protection clause of the fourteenth amendment to the Constitution of the United States by practicing *de jure* racial segregation of the students within its borders;
>
> (b) A unitary school system within the meaning of such amendments cannot be implemented within the boundaries of the transferor corporation; and
>
> (c) The Fourteenth Amendment compels the court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment.

[3] Intervening decisions by the various courts in this case are as follows: 368 F. Supp. 1191 (S.D. Ind. 1973), aff'd in part, rev'd in part, and remanded, 503 F.2d 68 (7th Cir. 1974), cert. denied, 421 U.S. 929 (1975); 419 F. Supp. 180 (S.D. Ind. 1975), aff'd, 541 F.2d 1211 (7th Cir. 1976), vacated and remanded, 429 U.S. 1068 (1977), on remand, 573 F.2d 400 (7th Cir. 1978).

discriminatory intent and purpose of confining black students in the IPS school system to the 1969 boundaries of that system, thereby perpetuating the segregated white schools in suburban Marion County" (456 F. Supp. at 188).[4] The court then ordered that black students from IPS be transferred into the suburban school districts. *Ibid.*, aff'd, 637 F.2d 1101 (7th Cir.), cert. denied, 449 U.S. 838 (1980).

Prior to the beginning of the 1981-1982 school year, several of the suburban school districts receiving black students from IPS petitioned the district court to supplement its judgment, inter alia, to assess the entire cost of the interdistrict remedy against the State. The court granted the petition, concluding (Pet. App. A39-A45) that because the State is solely responsible for the interdistrict violation, it should be required to pay the costs of the interdistrict remedy. The district court's financing plan (*id.* at A22-A36) requires the State to pay transfer tuition for IPS students' transportation costs (including transportation for extracurricular activities), other costs incurred by the receiving districts in connection with implementing the desegregation plan, and the increased operational costs of IPS resulting from loss of the transferred students. The plan provides that payments shall first be made from unappropriated funds and shall not reduce payments that any school corporation is otherwise entitled to receive under applicable statutes (*id.* at A33).[5]

---

[4]The principal basis for the district court's finding was a 1969 statute, known as "Uni-Gov" (Ind. Code Ann. § 36-3-1-1 *et seq.* (Burns Repl. 1981)), which expanded the boundaries of the city of Indianapolis to encompass all of Marion County but did not similarly expand the boundaries of IPS.

[5]The state previously had been ordered to pay for certain ancillary relief, e.g., in-service training for teachers (506 F. Supp. 657, 674 S.D. Ind. 1979), and the court of appeals affirmed. 637 F.2d 1101, 1116 (7th Cir. 1980).

The court of appeals affirmed (Pet. App. A1-A19), rejecting the state's contention that the district court's order specifying the source of funding constituted an "improper invasion of its sovereignty" (*id.* at A10). The panel majority ruled that this provision of the order was necessary as an interim measure since the legislature had already adjourned for the fiscal year and would not reconvene in time to appropriate funds for the beginning of the school year (*ibid.*). Finally, the court held that the district court had not abused its discretion in ruling that no portion of the cost of the interdistrict remedy should be funded out of appropriations ordinarily paid to IPS and the suburban districts; it reasoned that the school districts subject to the court's order would be "further victimized" were they required "to pay the cost of remedying their own injuries" *(ibid.)*.[6]

---

[6]The court of appeals also held the Indiana Transfer Act inapplicable to this case since it is triggered only in those situations where, inter alia, a constitutional violation is committed by the transferor school district (here, IPS) which can be remedied only through interdistrict transfer of students. Since the district court had determined that only the state was responsible for the interdistrict violation, the Act was held inapplicable. The court further held that, even if the Act applied, neither the Tenth Amendment nor principles of equity or federalism prohibited the district court from rejecting the state's decision to require IPS to help defray the cost of remedying the interdistrict violation (Pet. App. A5-A6).

Finally, the court addressed the state's argument, not pursued by the State in its petition, that the district court erred in requiring the State to reimburse IPS for the financial loss occasioned by the transfer of a large number of its students and to pay the cost of transportation for extracurricular activities of the transferred students. The court concluded (1) that the record supported the factual finding that IPS would incur a loss as a consequence of the interdistrict remedy, and (2) that the provision of extracurricular transportation was necessary to the success of the plan. It thus found no abuse of discretion in inclusion of these elements in the district court's order.

Judge Posner dissented, on the ground that the financing plan was not an appropriate exercise of the district court's equity power (Pet. App. A11-A19). He reasoned that the State, like any unsuccessful litigant, should be allowed to determine how to shoulder the cost of its obligation under the remedial decree and that, unless it defaults on its obligation, or attempts to discharge its responsibilities in an unlawful manner, the federal courts have no occasion to intervene (*id.* at A14-A15). He further stated that although the suburban districts were absolved of legal liability for the interdistrict violation, their complicity in the acts resulting in the violation rendered their invocation of the court's equitable jurisdiction an "effrontery" (*id.* at A19).[7]

DISCUSSION

The questions presented in this case relate exclusively to a dispute among the state defendants concerning who will bear the financial burden of the interdistrict remedy. The district court found the State responsible for the segregation of Marion County schools and ordered the implementation of a desegregation plan adequate to remedy the interdistrict violation. The finding of liability and the remedy were upheld on appeal. So long as defendants lawfully and in good faith comply with the court's interdistrict

---

[7]Judge Posner did not suggest that the decision here conflicts with that of any other court of appeals (see Pet. App. A-11) or with any decision of this Court (see *id.* at A-19).

desegregation plan, the interest of the United States in the matter is at an end. Accordingly, we express no view on the merits of the issues raised in the petition for a writ of certiorari.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

CHARLES J. COOPER
Deputy Assistant Attorney General

NOVEMBER 1982

DOJ-1982-11

Office - Supreme Court, U.S.
FILED
DEC 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT D. ORR
AS GOVERNOR OF THE STATE
OF INDIANA, *et al.*
Petitioners,

v.

THE BOARD OF SCHOOL COMMISSIONERS
OF THE CITY OF INDIANAPOLIS, *et al.*,
Respondents.

REPLY OF PETITIONERS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LINLEY E. PEARSON
Attorney General of Indiana
DAVID MICHAEL WALLMAN
Deputy Attorney General
DONALD P. BOGARD
Special Counsel
Attorneys for Petitioners

219 State House
Indianapolis, Indiana 46204
(317) 232-6210

Central Publishing Company, Inc., Indianapolis, IN 46206

TABLE OF CONTENTS

	PAGE
Argument	1
Conclusion	6

TABLE OF AUTHORITIES

CASES	PAGE
Evans v. Buchanan (3d Cir. 1978), 582 F.2d 750	5
Insurance Group Committee v. Denver & Rio Grande R.R., 329 U.S. 607 (1947)	3
Milliken v. Bradley, 418 U.S. 717 (1974)	2
U.S.A. v. Board of School Comm. (S.D.Ind. 1971), 332 F.Supp. 655	1
U.S.A. v. Board of School Comm. (S.D. Ind. 1975), 419 F.Supp. at 188	2
U.S.A. v. Board of School Comm. (S.D.Ind. 1978), 456 F.Supp. 182	3
U.S.A. v. Board of School Comm. (7th Cir. 1976), 541 F.2d 1211	3
U.S.A. v. Board of School Comm. (7th Cir. 1980), 637 F.2d 1101, *cert. denied* 101 S.Ct. 114	1, 3
U.S.A. v. Board of School Comm. (7th Cir. 1982), 677 F.2d 1185	5
U.S.A. v. Board of School Comm., 101 S.Ct. 114 (1980)	2

CONSTITUTIONAL AND STATUTORY PROVISIONS

	PAGE
Tenth Amendment, Constitution of the United States of America	3, 4
IC 20-8.1-6.5-1 *et seq.* (Transfer Statute)	2, 4, 5
IC 36-3-1-1 *et seq.* (Uni-Gov)	1

ARGUMENT

Come now Petitioners Robert D. Orr, as Governor of the State of Indiana; Linley E. Pearson, as Attorney General of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; the Indiana State Board of Education, a public corporate body; and all additional state officials who have been duly served and joined as party-defendants below, and file this Reply to the contentions raised by the various Respondents in this Court.

1. All Respondents rely upon the theory that only the State of Indiana was responsible for the interdistrict violation which necessitated the desegregation order. This case was commenced in May of 1968 by the Justice Department against Indianapolis Public Schools (IPS) only. The District Court found that IPS had committed acts of *de jure* segregation in 1954 at the time of this Court's *Brown* decision and in 1968 at the time the case was brought, 332 F.Supp. 655 (S.D.Ind. 1971). The State was not a party to the original action which produced these findings, although the District Court later ruled that all added parties were bound by them. Indeed, the Justice Department never sought a remedy against the State. It is, therefore, clear that but for the actions of IPS in 1954 and 1968 this case would not be before the Court at this time. The passage of Uni-Gov, IC 36-3-1-1 *eq seq.*, the sole basis of State liability, occurred in 1969 and became effective in 1970. Respondents' contention that the State violation forms the basis of the remedy ignores the fact that the IPS violations precipitated the suit and carried it to this juncture. The Seventh Circuit clearly recognized that Marion County was segregated *prior* to enactment of Uni-Gov, 637 F.2d 1101 at 1107 (7th Cir. 1980).

2. Lawrence Respondents maintain that the State has been a party to the creation of the substantive decree and

that it is in some way unusual for State Petitioners to be concerned for the rights of black parents and students. Petitioners would submit that they, and their predecessors in office, consistently opposed the creation of a substantive plan which extended beyond the boundaries of IPS, the only segregated Marion County school district. Indeed, State Petitioners joined in Respondents' opposition to this plan up through this Court's denial of certiorari in 1980, 101 S.Ct. 114 (1980). Petitioners would submit that they, by their consistent action throughout this appeal, have not waived, as Lawrence Respondents allege, the opportunity to point out to this Court the inherent and obvious denial of substantive rights to black parents that is supported by the decree which is the subject of this Petition.

There is *no* school desegregation case or precedent from this Court which, like the District Court's order below, approves the judicial *creation* of school districts where black parents are excluded from school board membership, denied the right to vote for school board members, or denied the substantive rights regarding school governance available to white parents. Respondents' contention that judicial approval of a financing mechanism which insulates all the parties "restores the victims of past discrimination" is unsupportable when that decree solidifies a substantive order which is patently discriminatory.

3. Lawrence Respondents suggest that application of the Indiana Transfer Statute, IC 20-8.1-6.5-1 *et seq.* is in some way impossible after this Court's determination in *Milliken v. Bradley*, 418 U.S. 717 (1974). Respondents' position is incorrect and, in any event, is unavailable to them at this time. The District Court specifically found the three (3) statutory predicates for application of the Transfer Statute on three (3) occasions *subsequent* to this Court's *Milliken* decision, 419 F.Supp. at 184 (S.D.Ind. 1975); an unpublished decision of June 2, 1978; and 456

F.Supp. at 191 (S.D.Ind. 1978). The Seventh Circuit noted that the Transfer Statute would obligate IPS to participate in financing metropolitan desegregation some two(2) years after *Milliken*, 541 F.2d 1211 at 1215 n.2 (7th Cir. 1976). In 1980, without reversing the District Court's findings, the Seventh Circuit concluded only that the Transfer Statute did not provide *independent* authority to order student transfers; that it provided simply a procedural mechanism to pay for transfers ordered due to unconstitutional segregatory acts, 637 F.2d at 1112 (7th Cir. 1980). These findings now constitute the law of the case. *Insurance Group Committee v. Denver & Rio Grande R.R.*, 329 U.S. 607 at 612 (1947).

4. Respondents Lawrence and IPS also suggest that the Transfer Statute is inapplicable due to the context of its passage in 1974. Petitioners would submit that in Indiana there is no precedent for using speculation regarding the circumstances surrounding a state statutory enactment to void that enactment when, as here, the statute is applicable on its face and formal legislative history is not recorded.

5. Lawrence Respondents, ignoring the fact that the Transfer Statute obligates the State of Indiana to participate in the payment process, continue to characterize application of the Transfer Statute as unfair. Presumably, this contention is based upon the argument that Indiana has no authority to structure its own finances. Assuming, for purposes of argument only, that Lawrence Respondents are correct and only the State is responsible for metropolitan segregation in Marion County, the question remains regarding Indiana's Tenth Amendment authority to apportion its costs in any manner it chooses. If a judgment is so large as to require an increase in taxes, it is patently beyond the authority of the judiciary to void the decision of the Legislature as to what segment of society is to bear that tax burden absent some serious and independent constitutional defect. In the case at bar,

Petitioners would submit that a judicial finding of culpability in any case is superfluous when the State has exercised its sovereignty in determining the manner of payment. As a general concept, the federal nature of our government, and the remaining sovereignty posited by the Tenth Amendment, permit the State to, in effect, pass liability in a manner of its own choosing. The Transfer Statute, which does no more than obligate the State to participate in and, in essence, to bear the entire cost of interdistrict desegregation if the parties are unable, presents no independent constitutional defect which would authorize the federal judiciary to void the enactment and prevent its application.

6. Lawrence Respondents also incorrectly claim that the Tenth Amendment protection extends only to taxing issues and the Transfer Statute is not such a statute. Petitioners would submit that to the extent that the Transfer Statute calls for the expenditures of public funds and specifically calls for the placement of the costs on both the State of Indiana and the involved school systems, it does indeed come within the ambit of state sovereignty assured by the Tenth Amendment. Neither the Tenth Amendment nor the reported cases construing it indicate that a mechanical or formal approach is to be utilized in determining whether the activity in question comes within the parameters of Tenth Amendment authority.

7. Lawrence Respondents incorrectly claim that Petitioners have abandoned any effort to make IPS or the Housing Authority of the City of Indianapolis (HACI) responsible for payment, and instead seek to make the suburban school systems responsible. Petitioners have consistently contended simply that the Transfer Statute is applicable and that ignoring the HACI violation and the responsibility of the suburbs by placing the entire burden upon the State of Indiana is inequitable and unjust. Judge Posner, in dissent, stated succinctly the attitude and

involvement of the suburbs and their elected representatives in enacting the statute which comprised the "state violation," 677 F.2d at 1193.

8. Respondents, particularly Respondent Indiana State Teachers Association (ISTA), seriously misconstrue both the evidence and the impact of Petitioners' contentions. ISTA claims that Petitioners' contentions will make former IPS students who suffered from past IPS discrimination responsible for paying for the present remedy. The ISTA position not only rests upon broad and unwarranted assumptions regarding material not in evidence, but seriously mischaracterizes the impact of the Transfer Statute. The Transfer Statute recognizes that an involved school corporation will have certain cost savings from the transfer of students from its system. The statute provides a calculation to determine if such savings exist, IC 20-8.1-6.5-3. When such savings do not exist, and the receiving schools have no funds budgeted to pay the costs, then the Transfer Statute obligates the State to make loans, grants, or advances. Also, since the State already provides approximately fifty-one percent (51%) of the IPS operating budget, there is no legal prohibition on IPS seeking an added appropriation from the General Assembly for any such expenses. The adverse impact suggested by Respondents upon those past victims of discrimination is illusory.

9. All Respondents cite a litany of reported desegregation cases in support of the proposition that it is proper to have a state participate in financing a desegregation remedy. Those cases, however, are inapplicable to the central question in this action because *none* of them involved a state's effort to provide a workable financing method by legislative action. In this regard, this case is one of first impression for this Court, the Seventh Circuit result being at variance with the approach taken by the Sixth Circuit in *Evans v. Buchanan*, 582 F.2d 750 (3rd Cir. 1978).

10. The Lawrence Respondents acknowledge that they had no standing to petition the District Court for an order compelling the State to pay all costs of desegregation when they state on page 4 of their Brief that the Transfer Statute "if applicable would have placed the majority of these costs on IPS and limited the State's liability to essentially one-half of the costs of transportation." Thus, the suburban respondent school corporations (movants below) would not have incurred any financial liability. Lawrence Respondents also acknowledge on page 9 of their Brief that IPS did not file the petition to have the State assume all costs of financing.

CONCLUSION

For the foregoing reasons, Petitioners pray that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana
DAVID MICHAEL WALLMAN
Deputy Attorney General
DONALD P. BOGARD
Special Counsel
Attorneys for Petitioners

219 State House
Indianapolis, Indiana 46204
(317) 232-6210